Supreme Court, U.S.
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APPENDIX

In The

Supreme Court of the United States

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 25, 1993
CERTIORARI GRANTED MARCH 29, 1993

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APPENDIX A — DOCKET SHEET

U.S. District Court
MIDDLE DISTRICT OF TENNESSEE (Nashville)

CIVIL DOCKET FOR CASE #: 90-CV-524
Filed: June 18, 1990

Acuff-Rose Music v. Campbell, et al
Assigned to: Judge Thomas A. Wiseman, Jr.
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Jury demand: Plaintiff
Nature of Suit: 820
Jurisdiction: Federal Question

Cause: 17:101 Copyright Infringement

ACUFF-ROSE MUSIC, INC. plaintiff	Alan L Marx [COR LD NTC] Francis J. Del Casino [COR LD NTC] Elizabeth B. Marney [COR LD NTC] E. Andrew Norwood [COR LD NTC] King & Ballow 200 Fourth Avenue, N. 1200 Noel Place Nashville, TN 37219 (615) 259-3456
v.	

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LUTHER R. CAMPBELL aka Luke Skyywalker defendant	Alan Mark Turk [COR LD NTC] Sanford R. Ross [COR LD NTC] Health America Corporation 3310 West End Avenue 4th Floor Nashville, TN 37203 (615) 386-9991
CHRISTOPHER WONGWON aka Fresh Kid Ice defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above) [COR LD NTC]
MARK ROSS aka Brother Marquis defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above)
DAVID HOBBS aka Mr. Mixx defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above) [COR LD NTC]
2 LIVE CREW defendant	Alan Mark Turk (See above) [COR LD NTC]

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	Sanford R. Ross (See above) [COR LD NTC]
LUKE SKYYWALKER RECORDS defendant	Alan Mark Turk (See above) [COR LD NTC] Sanford R. Ross (See above) [COR LD NTC]

Date	No	Proceedings
6/18/90	1	COMPLAINT, w/ attached Exhibits A-E. (Summons(es) issued) Filing fee paid in the amount of : $120.00 Receipt # 28267. (ag) [Entry date 09/10/91]
7/23/90	2	STIPULATION by Judge Thomas A. Wiseman Jr. : It is agreed that the dfts shall have until close of business on 8/1/90 to file a responsive pleading to complaint. (EOD 7/24/90) (cc: all counsel) (1h) [Entry date 10/16/91]
8/1/90	3	MOTION by defendants to dismiss (1h) [Entry date 10/16/91]
8/1/90	4	AFFIDAVIT of Oscar Brand re [3-1] (1h) [Entry date 10/16/91]

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Date	No	Proceedings
8/1/90	5	MEMORANDUM by defendants in support of motion to dismiss [3-1] (1h) [Entry date 10/16/91]
8/3/90	6	MOTION by defendants to deposit funds in amount of $13,867.56 w/att Order for same (lh) [Entry date 10/16/92]
8/3/90	7	AFFIDAVIT of Luther Campbell re [6-1] (1h) [Entry date 10/16/91]
8/3/90	8	AFFIDAVIT of M. William Krasilovsky re [6-1] (1h) [Entry date 10/16/91]
8/15/90	9	RESPONSE by plaintiff to motion to deposit funds [6-1] (1h) [Entry date 10/16/91]
8/15/90	10	MOTION by plaintiff to convert dft's mtn to dismiss to a mtn for summary judgment (1h) [Entry date 10/16/91]
8/24/90	11	ORDER by Judge Thomas A. Wiseman Jr. granting motion to deposit funds [6-1] Dfts deposit w/the court $13,867.56. Court will hold these funds during the pendency of this litigation or until such time as the court determines said funds should be

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Date	No	Proceedings
		released. These funds will be automatically rolled over into an interest bearing account unless otherwise ordered by the court. Ordered that counsel has designated that these funds be deposited in an interest bearing checking account at First American National Bank, in the name of the Clerk. Ordered that the clerk deduct an amount equal to the income earned and credited to the investment account for the first 45 days of income earned and to deposit in the U.S. Treasury. (EOD 8/24/90) (cc: all counsel) (1h) [Entry date 10/16/91]
8/24/90	12	AGREED ORDER by Judge Thomas A. Wiseman Jr. Ordered that pltf's response to motion to dismiss [3-1] will be due 8/28/90 (EOD 8/27/90) (cc: all counsel) (1h) [Entry date 10/16/91]
8/28/90	13	RESPONSE by plaintiff to motion to dismiss [3-1] w/atts consisting of copy of Declaration of Gerald E. Teifer, Declaration of Earl V. Spielman, etc. (1h) [Entry date 10/16/91]

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Date	No	Proceedings
8/28/90	14	DECLARATION of Earl V. Spielman, att to [13-1] (1h) [Entry date 10/16/91]
8/30/90	15	NOTICE by plaintiff of substitution of substitution of original declaration of Gerald E. Teifer (cpy of same att to resp, #13) (1h) [Entry date 10/16/91]
8/30/90	16	DECLARATION of Gerald E. Teifer re [13-1] (1h) [Entry date 10/16/91]
10/5/90	17	SUPPLEMENTAL MEMORANDUM by defendants in support of motion to dismiss [3-1] (1h) [Entry date 10/16/91]
10/26/90	18	SCHEDULING ORDER Judge Thomas A. Wiseman Jr., pretrial conference set for 1:00 8/9/91; jury trial set for 9:00 8/27/91 (EOD 10/26/90) (cc: all counsel) (1h) [Entry date 10/16/91]
10/26/90	19	ORDER by Judge Thomas A Wiseman Jr. This action is set for trial on Tuesday, 8/27/91, 9:00 a.m., Nashville. If action is to be settled, the Courtroom Deputy shall be notified by noon on Friday before the

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Date	No	Proceedings
		date of trial. If settlement is reached thereafter resulting in the non-utilization of jurors, the costs of summoning jurors may be taxed to the ptys dependent upon the circumstances. The requirements set forth in this order shall also apply to any future continuances of the above trial date. (EOD 10/26/90) (cc: all counsel) (1h) [Entry date 10/16/91]
12/14/90	20	MOTION by plaintiff to compel production of documents (1h) [Entry date 10/16/91]
12/14/91	21	MEMORANDUM by plaintiff in support of motion to compel production of documents [20-1] (1h) [Entry date 10/16/91]
1/4/91	22	MOTION by defendants to extend time to respond to pltf's mtn to compel (1h) [Entry date 10/16/91]
1/4/91	23	AFFIDAVIT of Alan Mark Turk re [22-1] (1h) [Entry date 10/16/91]
1/10/91	24	ORDER by Judge A. Wiseman Jr. granting motion to extend [22-1] time to respond to mtn to compel to 1/18/91 (EOD 1/10/91) (cc: all counsel) (1h) [Entry date 10/16/91]

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Date	No	Proceedings
1/11/91	25	MEMORANDUM OF THE COURT (EOD 1/14/91) (cc: all counsel) (1h) [Entry date 10/16/91]
1/11/91	26	ORDER by Judge Thomas A. Wiseman Jr. For the reasons stated in accompanying memo, granting motion to dismiss (summary judgment) [3-1] pursuant to Rule 56 of the FRCP. Dft's rendition of "Pretty Woman" is a parody of the original "Oh, Pretty Woman" that constitutes fair use. The two TN state law claims for interference w/business relations and interference w/prospective business advantage for the performance and distribution of a cpy of "Oh, Pretty Woman" are preempted. dismissing case (EOD 1/14/91) (cc: all counsel) (1h) [Entry date 10/16/91]
1/16/91	27	RESPONSE by defendants to motion to compel production of documents [20-1] (1h) [Entry date 10/16/91]
2/11/91	28	NOTICE OF APPEAL by plaintiff from Dist. Court decision [26-2] entered on 1/14/91 (1h) [Entry date 10/16/91]

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Date	No	Proceedings
2/13/91	—	Short and Certified Record on Appeal sent to 6th CCA re [28-1] (1h) [Entry date 10/16/91]
2/13/91	29	MOTION by plaintiff for entry of supplemental order (1h) [Entry date 10/16/91]
2/14/91	30	SUPPLEMENTAL ORDER by Judge Thomas A. Wiseman Jr. granting motion for entry of supplemental order [29-1] The court hereby certifies that the Order of 1/14/91 should be appealable pursuant to 28:1292(b). This supplemental order is entered in supplementation and amendment of the order and memo entered on 1/14/91 (EOD 2/19/91) (cc: all counsel) (1h) [Entry date 10/16/91]
2/19/91	—	TRANSMITTED supplemental record on appeal to 6th CCA re [28-1] enclosing docs # 29 & 30 (1h) [Entry date 10/16/91]
2/19/91	31	MEMORANDUM by plaintiff in support of motion for entry of supplemental order [29-1] (1h) [Entry date 10/16/91]

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Date	No	Proceedings
2/20/91	—	TRANSCRIPT Order Form for dates: trans unnecessary for appeal re [28-1] (1h) [Entry date 10/16/91]
3/4/91	—	NOTIFICATION by 6th CCA of Appellate Docket Number 91-5232 (1h) [Entry date 10/16/91]
4/3/91	—	INFORMATION COPY from 6th CCA dtd 4/1/91, action is dismissed for lack of jurisdiction. This dismissal will have no effect on plt's pending petition for permission to appeal pursuant to 28:1292(b) (1h) [Entry date 10/16/91]
4/8/91	32	ORDER from 6th CCA dtd 4/4/91, petition for leave to appeal is denied (1h) [Entry date 10/16/91]
5/14/91	33	MANDATE from 6th CCA dtd 4/25/91, dismissing the appeal [28-1] for lack of jurisdiction. This dismissal will have no effect on pltf's pending petition for permission to appeal pursuant to 28:1292(b) (1h) [Entry date 10/16/91]
5/14/91	—	RECORD on appeal returned from 6th CCA re appeal [0-0] (1h) [Entry date 10/16/91]

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Date	No	Proceedings
6/10/91	34	MOTION by plaintiff for distribution of funds or permission to file additional brief (1h) [Entry date 10/16/91]
6/10/91	35	MOTION by plaintiff to amend complaint w/original of same att (1h) [Entry date 10/16/91]
6/10/91	36	MEMORANDUM by plaintiff in support of motion to amend complaint [35-1] (1h) [Entry date 10/16/91]
6/10/91	—	REMARK: Case inadvertently closed. Case reopened this date (1h) [Entry date 10/16/91]
6/19/91	37	RESPONSE by defendants to motion to amend complaint [35-1] (1h) [Entry date 10/16/91]
6/19/91	38	RESPONSE by defendant to motion for distribution of funds [34-1] (1h) [Entry date 10/16/91]
7/8/91	39	REPLY by plaintiff to response to motion to amend complaint [35-1] (1h) [Entry date 10/16/91]
7/24/91	40	SUPPLEMENTAL MEMORANDUM by defendants in opposition to motion to amend complaint [35-1] (1h) [Entry date 10/16/91]

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Date	No	Proceedings
8/2/91	41	NOTICE of hearing; prtrial conf cancelled on 1:00 8/9/91; status conf set on 1:00 8/9/91 (1h) [Entry date 10/16/91]
8/7/91	42	NOTICE of offer of judgment by defendants (1h) [Entry date 10/16/91]
8/8/91	43	ORDER by Judge Thomas A. Wiseman Jr. denying motion to amend complaint [35-1] The amendment is untimely (EOD 8/9/91) (cc: all counsel) (1h) [Entry date 10/16/91]
9/9/91	44	"Supplemental" BRIEF FILED by plaintiff Acuff-Rose Music on damages and on new evidence as requested by the Court during the status conference held 8-9-91. (ag) [Entry date 10/16/91]
9/9/91	45	DECLARATION by Jerry Flowers in Support of Brief [44-1]. (ag) [Entry date 10/16/91]
9/20/91	46	RESPONSE by defendants to plaintiff's supplemental brief on damages and new evidence [44-1]. (ag)[Entry date 10/16/91]

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Date	No	Proceedings
9/30/91	47	ORDER by Judge Thomas A. Wiseman Jr.: In accordance with the Court's 1-14-91 order finding that the defendants' musical parody is protected under the fair use doctrine, the Court hereby ORDERS that the sum total of the funds and interest deposited with the Court pursuant to FRCP 67 be returned to the defendants. This is a final order terminating case from which an appeal of right lies. It is so Ordered. (EOD 9-30-91) (cc: all counsel and Financial Deputy) (ag) [Entry date 10/16/91]
10/3/91	48	MOTION by defendants for the Court to amend its order entered 9-30-91 to reflect that the funds be payable to Alan Mark Turk. (ag)
10/8/91	49	ORDER by Judge Thomas A. Wiseman Jr. granting motion for the Court to amend its order entered 9-30-91 to reflect the funds be payable to Alan Mark Turk [48-1]. (EOD 10-9-91) (cc: all counsel and Financial Deputy) (ag) [Entry date 10/16/91]

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Date	No	Proceedings
10/15/91	50	NOTICE OF APPEAL by plaintiff from Dist. Court decision [47-2] entered on 9/30/91 (1h) [Entry date 10/16/91]
10/15/91	—	RECEIVED filing fee (1h) [Entry date 10/16/91]
10/16/91	—	Short Record on Appeal sent to 6th CCA re [50-1] (1h)
10/16/91	—	REMARK: Service of NOA to Alan Mark Turk & Sanford R. Ross (1h)
10/28/91	—	NOTIFICATION by 6th CCA of Appellate Docket Number 91-6225
11/6/91	—	TRANSCRIPT Order Form for dates: trans unnecessary for appeal re [50-1] (1h)
11/6/91	—	Notice of Completion mailed to 6CCA (1h)

APPENDIX B — COMPLAINT FILED JUNE 18, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3 90 0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

JURY DEMAND
JUDGE WISEMAN

COMPLAINT

This is an action for copyright infringement and tortious interference with business relationships and prospective business advantage. In support of its complaint, Plaintiff states:

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PARTIES

1. Plaintiff Acuff-Rose Music, Inc., is a Tennessee corporation. Plaintiff maintains offices and does business in the Middle District of Tennessee.

2. Defendants Luther Campbell, a/k/a Luke Skyywalker, Christopher Wongwon, a/k/a Fresh Kid Ice, Mark Ross, a/k/a Brother Marquis, and David Hobbs, a/k/a Mr. Mixx, on information and belief are residents of the State of Florida.

3. These individuals make up a "rap" music group known professionally as The 2 Live Crew. The group does business and may be found in the Middle District of Tennessee.

4. Defendant Skyywalker Records is a corporation organized under the laws of the State of Florida, with its principal place of business in Miami, Florida. Skyywalker Records does business and may be found in the Middle District of Tennessee.

JURISDICTION AND VENUE

5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1338, 1331, and 1332 and the doctrine of pendant jurisdiction.

6. Venue lies in this district pursuant to 28 U.S.C. § 1400(a).

FACTS

7. Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman."

8. The musical work "Oh, Pretty Woman" contains subject

Appendix B

matter copyrightable under the laws of the United States.

9. Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to Acuff-Rose Music, Inc. in 1964.

10. Acuff-Rose's predecessor registered "Oh, Pretty Woman" for copyright protection on August 26, 1964, under Copyright Registration No. EP-191739.

11. The copyright registration in "Oh, Pretty Woman" was acquired by Opryland USA Inc. in 1985.

12. Plaintiff has complied with all of the requirements of the copyright laws of the United States and now holds the copyright to "Oh, Pretty Woman."

13. "Oh, Pretty Woman" was a hit when it was first recorded and has remained a popular work. Plaintiff receives frequent requests to license "Oh, Pretty Woman," and the revenues from domestic and foreign licensing have been and continue to be substantial. Plaintiff has zealously protected the copyright in "Oh, Pretty Woman" and has only granted licenses that were consistent with good taste and that furthered the value of the copyright. License requests are evaluated for their consistency with Plaintiff's long range plans for exploitation of the copyrighted work. Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied.

14. "Oh, Pretty Woman" has been frequently recorded and widely disseminated both by Plaintiff's predecessors in interest and by Plaintiff's licensees. Defendants had access to "Oh, Pretty Woman."

15. On July 5, 1989, Defendants wrote a letter to Plaintiff, requesting a license to create a derivative work from "Oh, Pretty Woman" for an upcoming album. The work was to be performed, manufactured, and distributed, both live and on commercially available record albums, tapes, and compact discs. On information and belief, various other uses were contemplated, including, but not limited to, distribution of the work as a single and as a music video.

16. On July 17, 1989, Plaintiff informed Defendants by letter that the license would not be granted. Exhibit A.

17. On or about July 15, 1989, Defendants released a record album entitled *As Nasty As They Wanna Be*. The album contained numerous sexually explicit lyrics.

18. Also on or about July 15, 1989, Defendants released a record album entitled *As Clean As They Wanna Be*. This album contains six of the 18 songs on *As Nasty As They Wanna Be*. In addition, *As Clean As They Wanna Be* contains four songs that did not appear on the *As Nasty As They Wanna Be* album.

19. One of the new songs on *As Clean As They Wanna Be* is a derivative work based on Plaintiff's copyrighted work "Oh, Pretty Woman."

20. Both the album cover and the label copy list the title of the song as "Pretty Woman" and state that it was "Written By: Roy Orbison and William Dees" and published by "Acuff-Rose (BMI)." A copy of the label information from the compact disc copy of *As Clean As The Wanna Be* is attached as Exhibit B.

21. The music used on the song "Pretty Woman" is substantially similar to "Oh, Pretty Woman" in melody. In

addition, the first verse of "Pretty Woman" is substantially similar to the first verse of "Oh, Pretty Woman." The unauthorized new lyrics created by Defendants for "Pretty Woman" are disparaging and therefore not consistent with maintaining the value of the copyright in "Oh, Pretty Woman." A transcription of the lyrics of "Pretty Woman" from *As Clean As They Wanna Be* is attached as Exhibit C. A copy of "Oh, Pretty Woman," as recorded by Roy Orbison, is attached as Exhibit D. A copy of "Pretty Woman," as it appears on the album *As Clean As They Wanna Be*, is attached as Exhibit E.

22. Plaintiff recently became aware of the Defendants' unauthorized use of "Oh, Pretty Woman."

23. On information and belief, Defendants are continuing to make use of "Oh, Pretty Woman," both in album and related sales and in live performances.

COUNT I

Copyright Infringement

24. Defendants have willfully infringed and commercially exploited Plaintiff's copyright in "Oh, Pretty Woman" by producing, manufacturing, distributing, and performing an unauthorized derivative work — their recording of "Pretty Woman" — that was copied from Plaintiff's copyrighted work, "Oh, Pretty Woman," and that was not licensed by Plaintiff.

COUNT II

Interference wjth Business Relationships

25. By their unlicensed copying and commercial

exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's business relationships with copyright licensees who have lawfully licensed the right to use "Oh, Pretty Woman."

COUNT III

Interference with Prospective Business Advantage

26. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's prospective business advantage in licensing future users of "Oh, Pretty Woman." In addition, Defendants have made disparaging unlicensed uses of "Oh, Pretty Woman." These uses have significantly lessened the value of licensing rights for "Oh, Pretty Woman," are not in good taste, and are detrimental to future attempts by Plaintiff to exploit the work by making it undesirable to future licensees.

RELIEF

WHEREFORE, Plaintiff prays that:

1. A date for a trial of the foregoing action be set.

2. Plaintiff be awarded either its actual damages plus Defendants' profits that resulted from their infringement of Plaintiff's copyright or the statutory damages for willful infringement, whichever is greater.

3. Plaintiff be awarded damages for Defendants' tortious interference with Plaintiff's business relationships and with Plaintiff's prospective business advantage.

4. Defendants forfeit all copies of *As Clean As They Wanna Be*, including all masters, tapes or other means by which *As Clean As They Wanna Be* can be reproduced.

5. Plaintiff be granted temporary and permanent injunctive relief.

6. Plaintiff be awarded its costs and reasonable attorneys' fees.

7. Plaintiff receive such other, further relief, both legal and equitable, as is just.

Respectfully submitted,

Of Counsel:

s/ Hal Willis / by EBM
Hal Willis

ACUFF-ROSE MUSIC, INC.

KING & BALLOW

By: s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
F. Casey Del Casino

1200 Noel Place
200 Fourth Ave. North
Nashville, TN 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Appendix B

EXHIBIT A — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix B

EXHIBIT B — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging)

EXHIBIT C — TRANSCRIPTION OF LYRICS AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN
(OH PRETTY WOMAN) AS RECORDED BY 2 LIVE CREW

PRETTY WOMAN WALKIN' DOWN THE STREET
PRETTY WOMAN GIRL YOU LOOK SO SWEET
PRETTY WOMAN YOU BRING ME DOWN TO THAT KNEE
PRETTY WOMAN YOU MAKE ME WANNA BEG PLEASE
OH, PRETTY WOMAN

BIG HAIRY WOMAN YOU NEED TO SHAVE THAT STUFF
BIG HAIRY WOMAN YOU KNOW I BET IT'S TOUGH
BIG HAIRY WOMAN ALL THAT HAIR IT AIN'T LEGIT
'CAUSE YOU LOOK LIKE 'COUSIN IT'
BIG HAIRY WOMAN

BALD HEADED WOMAN GIRL YOUR HAIR WON'T GROW
BALD HEADED WOMAN YOU GOT A TEENY WEENY AFRO
BALD HEADED WOMAN YOU KNOW YOUR HAIR COULD LOOK NICE
BALD HEADED WOMAN FIRST YOU GOT TO ROLL IT WITH RICE
BALD HEADED WOMAN HERE, LET ME GET THIS HUNK OF BIZ FOR YA
YA KNOW WHAT I'M SAYING YOU LOOK BETTER THAN RICE A RONI
OH BALD HEADED WOMAN

BIG HAIRY WOMAN COME ON IN
AND DON'T FORGET YOUR BALD HEADED FRIEND
HEY PRETTY WOMAN LET THE BOYS
JUMP IN

TWO TIMIN' WOMAN GIRL YOU KNOW YOU AIN'T RIGHT
TWO TIMIN' WOMAN YOU'S OUT WITH MY BOY LAST NIGHT
TWO TIMIN' WOMAN THAT TAKES A LOAD OFF MY MIND
TWO TIMIN' WOMAN NOW I KNOW THE BABY AIN'T MINE
OH, TWO TIMIN' WOMAN

OH PRETTY WOMAN

Appendix B

EXHIBIT D — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging)

Appendix B

EXHIBIT E — AUDIO TAPE

(Omitted Here But Submitted Separately As Lodging)

APPENDIX C — MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ORAL ARGUMENT REQUESTED

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO DISMISS

Come now the Defendants, by and through their attorneys, and move in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure for this Court to dismiss the Plaintiff's Complaint for failure to state a claim upon which relief can be granted. The Defendants rely on the Memorandum and Affidavits filed in

Appendix C

support of this Motion. The Defendants specifically request that the Court grant oral argument on this Motion.

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. # 7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX D — AFFIDAVIT OF OSCAR BRAND SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL, a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a

THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT OF OSCAR BRAND

STATE OF NEW YORK)

COUNTY OF NASSAU)

Comes now the Affiant and makes oath as follows:

1. I am Oscar Brand, a citizen and resident of Great Neck, New York. I am over the age of 18 years of age.

2. I am the Curator of the Songwriters Hall of Fame. I am the Editor of "Words About Music" for the National Academy of

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Popular Music. I am the Host of "The Folksong Festival," a radio program which has broadcast since 1945 on New York's Public Radio Station WNYC. I am a composer and writer on subjects in the field of popular music.

3. I have been on the faculty of Hosftra University and the New School, lecturing on the subject of folk music, the musical theatre, and American history as revealed in the popular music of the day. I have written books, including *Songs of '76*, (Evans-Lippincott), *The Ballad Mongers*, (Funk and Wagnalls), *The Bawdy Song*, (Grove - Dorchester), *Singing Holidays*, (Knopf), *When I First Came To This Land*, (Dutton), and numerous folios and song collections. As the artist on 85 LPs, videotapes, CD's videotapes, and audiocassetts, I have recorded many parodies of popular songs in such albums as "Tell It To The Marines," "Every Inch A Sailor," "Pie In The Sky," "The Wild Blue Yonder," "Laughing America," "Campaign Songs of the U.S.," etc. As the author of books and folios on the subject of folk and popular music, I have studied the use of parody and satire in American culture. On my radio shows for CBS, NBC, and WNYC, I have often broadcast entire programs on the subject of parodies and satires on popular songs, including a July 29, 1990 airing. As a writer-composer of popular songs, I have often heard many of my own compositions, such as "A Guy Is A Guy," "When I First Came To This Land," "My Old Man's A Sailor," etc. used as parodies and satires.

5. I have been asked to examine the merits of this case, in which a parody of the Roy Orbison - William Dees song, "Oh, Pretty Woman," has been recorded with the title "Pretty Woman" by the group called 2 Live Crew. For the reasons cited above, I believe I can discuss this subject with complete expertise.

6. In my opinion, both the words and the music of the 2 Live Crew performance are classic parodies.

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THE MUSIC

7. The Orbison recording of "Oh, Pretty Woman" begins with a 4/4 drum beat and a very recognizable "bass riff," (Numbers 1, 2, 3, 4). Attached as **Exhibit 1** to my Affidavit is the music chart of "Oh, Pretty Woman" in F. Major. The 2 Live Crew version begins with the same drum beat and the recognizable riff. The 2 Life Crew recording is essentially a musical joke, because the riff is followed by an atypical scraper — a Latin musical device, quite antithetic to the Orbison musical styling.

8. As in the Orbison recording, (6, 7, 8, 9, 10), the 2 Live Crew chorus sings the "Pretty Woman" chorus in the key of A major. But, the first soloist on the 2 Live Crew recording proceeds to sing in the key of B major, which, performed against the A major chorus, gives the song a comic aspect. Next, Orbison sings a refrain, (11, 12, 13, 14, 15). This refrain is ignored by 2 Live Crew, who repeat the "Pretty Woman" chorus. Then, in order to remind the listener that Orbison's song is the butt of the joke, the "bass riff" is repeated *eight times* by the 2 Live Crew musicians.

9. The second soloist for 2 Live Crew stays close to Orbison's original melody (19, 20, 21, 22, 23, 24), which makes the altered lyrics seem even more comic. However, once again, the 2 Live Crew soloist ignores the refrain, (25, 26, 27, 28, 29). He also ignores Orbison's following development (from 30 to 58), instead repeating the "Pretty Woman" chorus with comic words.

10. At the end of the 2 Live Crew recording, the bass riff is repeated, subtly changed by the dropping of one measure, another musical joke. Finally, the inappropriate scraper is again added to the riff to close the song.

11. *I*n sum, the music on 2 Live Crew's"Pretty Woman" uses

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just enough material from the Orbison composition to create a very sophisticated comic parody of the original song.

THE LYRICS

12. The essence of parody is in its play on words. Altering the expected is the key to its humor. The revised form must stay close enough to the original to make comic the sudden twist — the substitution of new words for the familiar.

13. It is for that reason, that the popular song has throughout our history been the vehicle for satire and parody. As I pointed out in my book *Songs of '76*, our first parodies were based on old ballads and folk songs. The American Revolution was fought with re-writes as well as with guns. Nowadays, our popular music parodies are more likely to be comic variations of Beatles songs, Dylanesque laments, and, more recently, Rock and Roll "strike-offs" of such artists as Chuck Berry and Madonna.

14. On July 29, 1990, I broadcast one of many public radio programs on the subject of parody, using songs performed at the 90th Annual Legislative Correspondents' Association dinner in Albany, New York. Senator Al D'Amato sang a parody of the copyrighted song "It's A Sin To Tell A Lie."

> "Be sure, it's true when you write a headline.
> It's a sin to tell a lie.
> Many a pol has been broken,
> Because The New York Times has spoken."

Another parody featured on the show was a sci-fi version of the copyrighted song "Casey Jones," printed with many others in the *Canadian Folksong Bulletin*, (June - 1989):

> "Come all ye spacemen, if you want to hear,
> The story of a great planeteer.
> Spacey Jones was the pilot's name,
> On a fuel-burning rocket, boys, he won his fame."

Merle Travis' "16 Tons" was parodied as "The Schoolteacher's Lament," ending with the words, "I owe my soul to the P.T.A."

15. Parodies have never interfered with the popularity of the original. "The Star Spangled Banner" was altered a thousand times but persisted for over a century as written by Francis Scott Key. The sales graph of "Hello, Dolly" didn't change when it became "Hello, Lyndon," and "Hello, Nixon." Hundreds of popular songs have been "covered" by parody performances and recordings without altering their popular appeal or interfering with their sales. The original song is used because it *is* popular and is so recognizable as to make the alterations more humorous. This is especially true in the case of Afro-American music, of which "rap" is a prime example, being derived from the old "talking blues" form. In talking blues and rap music, parody is often used for protest and satire. New works are substituted which make fun of the "white-bread" originals an the establishment without, in any way, compromising the integrity of the original.

16. In the case of 2 Live Crew's "Pretty Woman" it seems obvious that this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to "white-centered" popular music. They change the lyric "pretty woman" to "bald-headed woman," which is 100% pure parody.

17. Parody often changes the message of the original so that it becomes bawdy and sexist. The Orbison lyric invites the pretty

woman to "Come with me, baby, be mine tonight." The 2 Live Crew version makes the "pretty woman" into a "big hairy woman who ought to shave that stuff." And at the close of 2 Live Crew's version she turns out to be pregnant.

CONCLUSION

18. There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.

19. On the other hand, 2 Live Crew's versions, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

20. To conclude, it is my belief that parodies such as 2 Live Crew's "Pretty Woman" are vital American artifacts. They should be encouraged and protected. The creative edge which has made American music the envy of the world would greatly suffer if such productions as 2 Live Crew's "Pretty Woman" were in any way curtailed.

s/ Oscar Brand
OSCAR BRAND

Sworn to and subscribed before me
this 31 day of July, 1990.

s/ Michael Drosihn
Notary Public

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Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEYS FOR DEFENDANTS

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1st day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

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EXHIBIT 1 — MUSIC CHART OF "OH, PRETTY WOMAN"

(Omitted Here But Submitted Separately As Lodging)

APPENDIX E — MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I

PREFACE

The Plaintiff has sued the Defendants for copyright infringement (Count I), interference with business relations (Count II), and interference with prospective business advantage

(Count III) for the performance and distribution of a parody of its original work, "Oh, Pretty Woman." The Plaintiff has admitted that the Defendants' version, "Pretty Woman," is a parody of the origina! work. (See Exhibit B to the Affidavit of Luther Campbell.) This is not a disputed fact. There are not material facts in dispute. The Defendants are entitled to a judgment on the pleadings, as a matter of law because the Defendants' parody of the original work constitutes "fair use" under 17 U.S.C. Section 107 of the Copyright Act and therefore does not constitute infringement. Further, Counts II and III of the Plaintiff's Complaint are clearly preempted by 17 U.S.C. Section 301 of the Copyright Act. Therefore, as a matter of law, the Plaintiff's Complaint fails to state a claim upon which relief can be granted and should be dismissed.

II

STATEMENT OF THE FACTS

Roy Orbison and William Dees were the co-authors of an original musical work entitled "Oh, Pretty Woman." In 1964, Roy Orbison and William Dees assigned their rights in "Oh, Pretty Woman" to the Plaintiff, Acuff-Rose Music, Inc. On August 26, 1964, the Plaintiff registered "Oh, Pretty Woman" for copyright protection under copyright registration number EP-191739. In 1985, the copyright registration in "Oh, Pretty Woman" was assigned to Opryland U.S.A., Inc.

On July 5, 1989, the Defendants, by and through their general manager, Linda Fine, wrote Gary [sic Gerry] Teifer of Opryland U.S.A., Inc. and Acuff-Rose Music Group, Inc., advising the Plaintiff of the intent of the Defendant group, The 2 Live Crew, to write and perform a parody of the song "Oh, Pretty Woman." (See Exhibit A to the Affidavit of Luther Campbell.) The Defendants, by and through Ms. Fine, advised the Plaintiff that the Defendants

intended to afford the Plaintiff, Mr. Dees, and Mr. Orbison all credits evidencing their ownership and authorship of the song "Oh, Pretty Woman" and that the Defendants intended to pay the statutory rate for the use of said song. (See Exhibit A to the Affidavit of Luther Campbell.) On July 17, 1989, Gerry Teifer of Opryland Music Group, Inc. and Acuff-Rose Music Group, Inc. responded in writing to Ms. Fine's correspondence and stated that "I must inform you that we cannot permit the use of parody of "Oh, Pretty Woman." (See Exhibit B to the Affidavit of Luther Campbell.)

Despite the refusal by the Plaintiff to permit the parody of "Oh, Pretty Woman," the Defendants included same in its musical compilation, released in 1989, entitled "As Clean They Want To Be." The Defendants, as promised, acknowledged the Plaintiff's ownership of the song and the authorship by Mr. Orbison and Mr. Dees. (See Exhibit C to the Affidavit of Luther Campbell.) The Defendants have moved, in accordance with Rule 67 of the Federal Rules of Civil Procedure, to deposit into Court as payment to the Plaintiff all monies due and owed for all sales of albums, cassettes, and compact discs at the statutory rate provided by law. (See Exhibit D to the Affidavit of Luther Campbell.)

III

STATEMENT OF THE LAW

1. THE DEFENDANTS ARE ENTITLED TO A JUDGMENT ON THE PLEADINGS.

The Defendants have moved in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure for the Court to dismiss the Plaintiff's cause of action for "failure to state a claim upon which relief can be granted." Rule 12(b) provides in part:

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> . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c) of the Federal Rules of Civil Procedure provides in part:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Defendants have filed Affidavits with the Court of two expert witnesses: Oscar Brand and William Krasilovsky. The Defendants have also filed the Affidavit of the Defendant Campbell, the author of the parody. These Affidavits establish that the Defendants' parody of the Plaintiff's song, "Oh, Pretty Woman" constitutes "fair use" under 17 U.S.C. Section 107, of the Copyright Act. The Plaintiff, by and through its own agent, has admitted that the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," is a parody. (See Exhibit B to the Affidavit of Luther Campbell.)

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The Defendants concede that the Court in considering the Defendants' Motion must draw all reasonable inferences from the Plaintiff's Complaint. *Walker Process Equipment, Inc. v. Ford Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965); *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 376 (1952). In short, on a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "the allegations of the complaint should be construed favorably to the pleader." *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974).

The Defendants respectfully assert that the despite this standard, the Plaintiff's Complaint fails to state a cause upon which relief may be granted. The Complaint filed June 18, 1990, alleges that Plaintiff "has zealously protected the copyright in 'Oh, Pretty Woman' and has only granted licenses that were consistent with good taste and that furthered the value of the copyright. License requests are evaluated for their consistency with Plaintiff's long range plans for exploitation of the copyrighted work. Requests for licenses that either are not consistent with good taste or would disparage the future value of the copyright are denied." (Complaint, paragraph 13.)

The Plaintiff attached as Exhibit C to the Complaint a transcription of the lyrics of "Pretty Woman" from *As Clean As They Want To Be*. The Plaintiff's allegation that these lyrics "are not consistent with good taste or would disparage the future value of the copyright" is unfounded.

The Complaint attaches as Exhibit A the letter from Gerry Teifer, the Plaintiff's agent, that acknowledges that the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," is a parody. (Complaint, paragraphs 16) The Plaintiff admits that the Defendants did acknowledge their ownership interest on both the

cover and label copy of *As Clean As They Want To Be* and the authorship of Mr. Orbison and Mr. Dees. (Complaint, paragraph 20) The Complaint alleges that:

> The music used on the song "Pretty Woman" is substantially similar to "Oh, Pretty Woman" in melody. In addition, the first verse of "Pretty Woman" is substantially similar to the first verse of "Oh, Pretty Woman." The unauthorized new lyrics created by Defendants for "Pretty Woman" are disparaging and therefore not consistent with maintaining the value of the copyright in "Oh, Pretty Woman."
>
> . . .
>
> (Complaint, paragraph 21)

The Plaintiff's Complaint contains three separate counts. These counts are as follows:

COUNT I

Copyright Infringement

> 24. Defendants have willfully infringed and commercially exploited Plaintiff's copyright in "Oh, Pretty Woman" by producing, manufacturing, distributing, and performing an unauthorized derivative work — their recording of "Pretty Woman" — that was copied from Plaintiff's copyrighted work, "Oh, Pretty Woman," and that was not licensed by Plaintiff.

COUNT II

Interference with Business Relationships

> 25. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's business relationships with copyright licensees who have lawfully licensed the right to use "Oh, Pretty Woman."

COUNT III

Interference with Prospective Business Advantage

> 26. By their unlicensed copying and commercial exploitation of "Oh, Pretty Woman," Defendants have intentionally interfered with Plaintiff's prospective business advantage in licensing future users of "Oh, Pretty Woman." In addition, Defendants have made disparaging unlicensed uses of "Oh, Pretty Woman." These uses have significantly lessened the value of licensing rights for "Oh, Pretty Woman," are not in good taste, and are detrimental to future attempts by Plaintiff to exploit the work by making it undesirable to future licensees.

(Complaint, paragraphs 24-26)

The Plaintiff failed to allege any other allegations in their

Complaint. The Complaint, as filed, should be dismissed because it fails to state a cause of action upon which relief can be granted as a matter of law. The Defendants version of "Oh, Pretty Woman," "Pretty Woman," does not constitute copyright infringement as alleged by the Plaintiff because said version constitutes fair use under 17 U.S.C. Section 107 of the Copyright Act. The Plaintiff's allegations that the Defendants interfered with their business relationships and interfered with their prospective business advantage are preempted by their claim under the Copyright Act, in that 17 U.S.C. Section 301, preempts these allegations by the Plaintiff. However, even if the Copyright Act is not the Plaintiff's exclusive remedy, *arguendo*, then the Plaintiff's Complaint still fails to state and/or even infer how the Defendants have interfered with the business relationship and/or prospective business advantage of the Plaintiff.

2. THE DEFENDANTS' VERSION OF "OH, PRETTY WOMAN" IS PROTECTED BY ARTICLE I, SECTION 8 OF THE UNITED STATES CONSTITUTION AND THE COPYRIGHT ACT OF 1976.

Article I, Section 8 of the United States Constitution empowers Congress to "promote the progress of science and the useful arts . . . by securing for limited times to authors . . . the exclusive right to their . . . writings." The Supreme Court has stated that "the economic philosophy behind the copyright clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The authors interest is subordinated to this end. *United States v. Paramont Pictures, Inc.*, 334 U.S. 131, 158 (1948).

A conflict exists between the public's constitutional right of

reasonable access to copyrighted materials and the copyright owner's statutory privilege under the copyright law. The Constitution grants copyright owners no rights. It merely authorizes Congress, under severe limitations, to enact copyright legislation. At most, the copyright owner has a statutory privilege, not a constitutional right. A long and uninterrupted line of cases hold unequivocally that, apart from common law protection for unpublished works, copyright protection is completely and solely a statutory matter and that copyright is only a privilege or a franchise. It is settled law that all copyright is simply a creature of statute, wholly a matter of congressional discretion to grant or to withhold. *Kraft v. Kahn*, 117 F.2d 579, 580 (2nd Cir. 1941); *Keene v. Wheatley*, 14 F.Cas. 180, 185 (No.7644)(C.C.E.D.Pa. 1861) as cited in *The Constitutional Dimension of "Fair Use" in Copyright Law*. 50 Notre Dame Lawyer 790, 791 and 792 (June, 1975).

The Supreme Court has consistently held that "the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor but the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Fox Film Corp. v. Doval*, 286 U.S. 123, 127 (1932), as quoted in *Sony Corp. of America v. Universal Studios, Inc.*, 104 S.Ct. 774, 783 (1984). Thus, the American copyright system rests on the fundamental premise that vindication of the economic interest of the authors will ultimately maximize the information available to the public.

The Defendants have moved to deposit into Court. The statutory amount of money the Plaintiff is entitled to under the Copyright Act by virtue of the Defendants' use of its property. This payment by the Defendants satisfies their obligation to the Plaintiff under the Copyright Act.

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3. THE DEFENDANTS' VERSION OF "OH, PRETTY WOMAN" CONSTITUTES FAIR USE UNDER 17 U.S.C. SECTION 107 OF THE COPYRIGHT ACT.

The Fair use doctrine was discussed at length in *Triangle Publications, Inc. v. Knight-Ridder NewsPapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980), wherein the United States Court of Appeals for the Fifth Circuit described the history of "fair use." The Court described fair use as "a 'rule of reason' fashioned by Judges to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other." *Sobel, supra,* note 1, at 51 quoting Latman, Fair Use of Copyrighted Works 5 (Sen. Comm. On Judiciary Study No. 141960). "The fair use doctrine frequently serves to eliminate potential conflicts between copyright and free speech." See Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Calif.L.Rev. 283, 299, 303-04 (1979).

In *Meeropol v. Nizer,* 560 F.2d 1061, 1068 (2nd Cir. 1977), the United States Court of Appeals, Second Circuit, defined fair use as:

> A Privilege in others than the owner of the copyright to use the copyright material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright. The doctrine offers a means of balancing the exclusive right of a copyright holder with the public's interest in dissemination of information affecting areas of universal concern, such as art, science, history, or industry. *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977).

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In codifying the concept of fair use, Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development:

> The bill endorses the purpose and general cope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R.No. 94-1476, 94th Cong., 2d Sess. 66 (1976) (House Report), reprinted in [1976] U.S. Code Cong & Admin. News, pp. 5659, 5680 (referred to as USCCA). See also Ren.Rep.No.473, 94th Cong. 1st Sess. 62 (1975) (Senate Report).

The 1976 Copyright Act instructs Courts to consider four factors which had been previously judicially created. The statute indicates that these four factors are not necessarily exhaustive. 17 U.S.C. Section 107 provides in part:

> . . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a

commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980), the Court held that:

> The statute does not indicate how much weight is to be accorded each factor, but since the statutory formulation is simply a restatement of the case law, it is appropriate to look to the cases for guidance. Our research indicates that of these four factors, Courts have generally placed most emphasis on the fourth factor, the effect of the use upon the potential market for or the value of the copyrighted work. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130 (S.D.N.Y. 1968); 3 Nimmer on Copyright, section 13.05(b)(4), at 13-54 (1978) (indicating that the fourth factor is the most important and citing a host of cases).

In *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit held that the

question whether or not a parody constituted "fair use" is a matter of law for the Court, not a question of fact for the jury. In *Fisher,* the composers of "When Sunny Gets Blue" brought copyright infringement action and unfair competition action against composer of "When Sonny Sniffs Glue" and others. The United States District Court for the Central District of California, William Duffy Keller, Judge, granted summary judgment in favor of defendants, and plaintiffs appealed. The Ninth Circuit Court of Appeals held that: (l) the parody was fair use of the original; (2) the parody was not immoral or obscene so as to deprive it of fair use protection; (3) the defendants did not engage in unfair competition; and (4) the parody could have no defamatory or disparaging meaning to those who heard it. The Ninth Circuit, in affirming the trial court's granting of summary judgment, held:

> We dispose of this last argument first, because it is completely undercut by the Supreme Court's recent decision in *Harper & Row Publishers, Inc. v. Nation Enterprises,* __ U.S __, 105 S.Ct. 2218, 85 L.Ed.2d 558 (1985). The Court held in that case that "[f]air use is a mixed question of law and fact", id. at 2331, and that "[w]here the District Court has found facts sufficient to evaluate each of the statutory factors," an appellate court may conclude as a matter of law-without remanding for further fact finding-" 'that [the challenged use] do[es] not qualify as a fair use of the copyright work,' " id. (quoting *Pacific & Southern Co. v. Duncan,* 744 F.2d 1490, 1495 n.8 (llth Cir. 1984), cert. denied, __ U.S. __, 105 S.Ct. 1867, 85 L.Ed.2d 161 (1985)).

> No material historical facts are at issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper & Row*, these judgments are legal in nature, we can make them without usurping the function of the jury.

Whether or not the Defendants' parody constitutes fair use under 17 U.S.C. Section 107 of the Copyright Act is a question of law for this Court to determine.

The Courts have adopted two models of the fair use doctrine. The first model is the economic model. The "economic" model of fair use posits that socially valuable use of an original should be limited only when the taking would result in significant commercial harm to the holder of the copyright. According to this model, the availability of the fair use defense should turn on two key determinations: (1) the social value of the challenged use, and (2) the use's tendency to substitute for the copyright holder's actual or potential commercial exploitation of the original. Under this analysis, a Court should find uses that are of even minimal social value to be fair if they do not substitute for exploitation of the original work. *The Parody Defense to Copyrighted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1398 and 1399 (1984).

Because most Courts have accepted this utilitarian rationale for fair use, they have usually extended the defense to uses that appropriate originals yet are themselves creative — that is, "productive" uses. Whereas "reproductive" uses merely appropriate originals without adding a socially valuable creative element, the traditionally recognized types of productive use reportage, biography, criticism, and parody — build upon, and

perform functions different from, the originals they appropriate. *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2nd Cir. 1989). Because productive uses are presumed to be socially beneficial, Courts often pay little attention to the value of a use itself and instead focus on whether the use competes for the market of the original. *Meeropol v. Nizer*, 560 F.2d 1061 (2nd Cir. 1977). *The Parody Defense to Copyrighted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1399 and 1400 (1984).

A second model has been judicially created, referred to as the reasonableness model. Perhaps because it seems intuitively unfair to allow others to appropriate substantially from an author's original work, many Courts have disallowed the extensive or verbatim takings even when the copyright holder has not shown a likely threat to the economic value of his copyright. Thus, productive use cases — particularly parody cases — have been influenced by this second model of fair use. According to this model, the amount of the original incorporated into the challenged use — a consideration codified in the Copyright Act as the "amount taken" factor — is the central criterion for determining whether the use is reasonable and they whether it is fair. Courts tend to find extensive takings unreasonable particularly when the contested use is parody, because the parodist has derisively turned the original author's work against him. Perhaps in reaction to the parodist's affront, Courts have come to focus their analysis in parody cases on the amount of the original taken by the parodist. *The Parody Defense to Copyrighted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1400 (1984).

The preoccupation with the amount take, however, is inconsistent with the goal of American copyright protection: maximizing public access to information by providing economic

incentives for original creation. If a parody builds upon but does not commercially supplant an original, it produces a net increase in the amount of information available to society therefore, a purely economic analysis would require the protection of such a parody. *The Parody Defense to Copyriqhted Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev 1395, 1400 (1984).

The Defendants expert witness, Oscar Brand, has, in his Affidavit, compared the music and lyrics of the Plaintiff's "Oh, Pretty Woman" to the Defendants' parody, "Pretty Woman." (See Affidavit of Oscar Brand, paragraphs 7-17.) Mr. Brand states: "In sum, the music on 2 Live Crew's 'Pretty Woman' uses just enough material from the Orbison composition to create a very sophisticated comic parody of the original song." Mr. Brand further states: "The essence of parody is in its play on words. Altering the expected is the key to its humor. The revised form must stay close enough to the original to make comic the sudden twist — the substitution of new words for the familiar." (See Affidavit of Oscar Brand, paragraphs 11-12.)

The Defendants have alleged and the Plaintiff has admitted (see Exhibit B to the Affidavit of Luther Campbell) that the Defendants version of "Oh, Pretty Woman" is a parody. In *Cliffs Notes v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 493 (2nd Cir. 1989), the United States Court of Appeals, Second Circuit, held:

> We start with the proposition that parody is a form of artistic expression, protected by the First Amendment. For example, the Supreme Court has held that the First Amendment bars recovery "for the tort of intentional infliction of emotional distress by reason of" publication of satire "without showing in addition that the

> publication contains a false statement of fact which was made with 'actual malice.'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 882 99 L.Ed.2d 41 (1988). Similarly, our decisions have recognized "the broad scope permitted parody in First Amendment law." *Groucho Marx Prod., Inc. v. Day and Night Co.*, 689 F.2d 317, 319 n. 2 (2nd Cir. 1982); see *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 (2nd Cir. 1980) (per curiam) ("in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody. . ."). We have stated the "general proposition" that "parody and satire are deserving of substantial freedom — both as entertainment and as a form of social and literacy criticism." *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2nd Cir.) (emphasis in original), cert. denied, 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964). See generally Note, Trademark Parody: A Fair Use and First Amendment Analysis, 72 Va.L.Rev. 1079 (1986).

In *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit argued that in determining whether or not the parodist exceeded the amount that could be taken from the original work depended upon the medium of the respective work. The Court acknowledged "When the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied." The Court concluded that:

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> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy," provides some license for "closer" parody. *See id.* To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in his original expression." *Id.* We think the balance tips in the parodists' favor here. In view of the parody's medium, its purposes, and its brevity, it take no more from the original than is necessary to accomplish reasonably its parodic purpose.

794 F.2d at 439.

In applying the fair use doctrine to parody, the Court should modify the previously discussed models and apply a three part analysis. First, if the Plaintiff proves substantial similarity between use and original, the Defendants should have the burden of showing that their use is "productive" — that it falls into one of the recognized categories of productive fair use or that in some way it adds to and alters the function of the original work. Second, if the Defendants establish that their use is productive, the inquiry should shift to whether there is a substantial possibility that the use will compete significantly for the market of the original. If the Plaintiff cannot prove such a possibility, the Court should protect the use. Third, if there is a substantial possibility of substitution, the Court should weight the social value of the use against the countervailing economic disincentive to the author. *The Parody*

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Defense to Copyright Infringement: Productive Fair Use After Betamax, 97 Harv.L.Rev. 1395, 1409 (1984).

This Court should apply this three-part approach to the case at bar. Because parody is one of the traditional categories of productive use, any parody, including the Defendants' parody of the Plaintiff's copyrighted work, should be presumed productive. The Court should thus require the Plaintiff to demonstrate potential or actual commercial substitution of the parody for the original. The Plaintiff has failed to allege or even infer how the Defendants' parody will substitute for the original "Oh, Pretty Woman."

The Defendants, by and through their expert witnesses, have presented testimony that the Plaintiff's original work, "Oh, Pretty Woman," will not be substituted by the Defendants' parody, "Pretty Woman." This testimony is corroborated by simple logic and observation. William Krasilovsky states "the widespread publicity and news coverage involving 2 Live Crew, as well as my personal observation from hearing the recording, lead me to the conclusion that the intended audience for the two songs is entirely different. In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." (See Affidavit of William Krasilovsky, paragraph c.) This testimony is corroborated by the Affidavit of Oscar Brand, which concludes:

> 18. There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> 19. On the other hand, 2 Live Crew's versions, which is unquestionably a comic parody, is

> aimed at the large black populace which used to buy what was once called "race" records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original.

The Defendants respectfully assert that no matter which model this Court adopts, the Defendants' parody constitutes fair use under 17 U.S.C. Section 107.

4. THE DEFENDANTS' VERSION OF "OH, PRETTY WOMAN" IS A PARODY, FOR COMMERCIAL USE WHICH DOES NOT SUBSTANTIALLY COPY NOR COMPETE WITH THE PLAINTIFF'S VERSION.

Parody and burlesque, as used here, are interchangeable terms which refer to humorous works whose humor is derived from a mocking imitation of other, usually serious, works. Although parody and burlesque have different technical meanings, what is crucial to a legal analysis is a common characteristic; both, by definition, depend for their existence upon the opportunity to copy other works. It is this characteristic which creates a conflict with copyright protection. *Parody, Burlesque, and The Economic Rationale for Copyright,* 11 Connecticut Law Review 615, 616 (Summer 1979).

A literary critic would distinguish parody from burlesque, and both from their sibling, travesty. Travesty achieves its humor by putting characters from serious works in ridiculous situations and exploiting the incongruity of the juxtaposition. Burlesque is more sophisticated in that it at least imitates the style of the work

burlesqued for the purpose of poking fun by applying the style to some topical subject other than that of the original work. Parody, the highest of these arts, focuses on both style and subject matter of the work imitated, drawing humor and insight from subtle variations which expose weakness of the original. See D. MacDonald, parodies 557-53 (1960); Yankwich, *Parody and Burlesque in the Law of Copyright,* 33 Can B.Rev. 1139 (1955) Although these differences are significant to literary scholars, what is important for a legal analysis is that each kind of humorous imitation has artistic value and place in literary history. *Parody, Burlesque and The Economic Rationale for Copyright,* 11 Connecticut Law Review 615, 616, note 6, (Summer 1979).

A parody cannot succeed unless its audience perceives it relation to the work parodied. Whether parody is viewed as a form of criticism or a compliment to the work imitated, it is copying which makes parody a distinct art form. Because of this, a "parody" which does not imitate another work, or one which does so poorly, or one which copies a work unknown to its audience, offers little humor; it lacks a crucial element, a degree of similarity to the original which can be seen by the audience. *Parody, Burlesque, and The Economic Rationale for Copyright,* 11 Connecticut Law Review 615, 616 and 617 (Summer 1979).

Although the Courts have insisted that the application of the fair use doctrine as applied to the issue of parody must be considered on a case-by-case basis, a historical review of the application of the four factors of the statutory fair use doctrine in parody cases will assist the Court.

In *Benny v. Loew's, Inc.,* 239 F.2d 532 (9th Cir. 1956), affirmed by an equally divided Court Sub. Nom. *Columbia Broadcasting System v. Loew's. Inc.,* 356 U.S. 43 (1958), the

Courts held that the half-hour burlesque by Jack Benny of the movie "Gaslight," for television constituted a copyright infringement and granted an injunction. The central determination in reaching that decision was that the burlesque took substantially from the original. The Courts held that:

> Parodized or burlesqued taking is to be treated no differently from any other appropriation; that is, as in all other cases of alleged taking, the issue becomes first one of fact, i.e. what was taken and how substantial was the taking; and if it is determined that there was a substantial taking, infringement exists.

239 F.2d at 537.

Unfortunately, Mr. Justice Douglas, for unexplained reasons, disqualified himself in the Gaslight case which resulted in the United States Supreme Court failing to have a majority opinion because the remaining eight justices divided equally on the questions presented to the Court. The result was to leave standing the decision of the Ninth Circuit which was ambiguous and not well reasoned. It is apparent, from the opinions, that neither the trial court nor the Ninth Circuit were amused by Mr. Benny's attempted parody. The trial court and the Ninth Circuit simply concluded that the taking was far too substantial to constitute fair use.

In *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348, 350 (S.D.Cal. 1955), the same district judge who sat in the *Loew* (Benny) case, the Honorable James M. Carter, held that the telecast of the burlesque "From Here to Obscurity," performed by Sid Ceaser and Imogene Coca on the Show of Shows, did not

infringe the copyright of the producer in the picture "From Here to Eternity" nor did the telecast constitute an unfair competition as to such picture. Judge Carter, in *Columbia Pictures Corp.*, held:

> With some hesitation, but with the assurance that there is logic and fairness behind them, as well as general support in the law, we suggest these principles:
>
> (a) When the alleged infringing work is of the same character as the copyrighted work, vix., a serious work with a taking from another serious copyrighted work, then the line is drawn more strictly than when a farce or comedy or burlesque takes from a serious copyrighted work or vice versa.
>
> (b) In historical burlesque a part of the content is used to conjure up, at least the general image, of the original. Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original.
>
> (c) Burlesque may ordinarily take the local,e the theme, the setting, situation and even bare basic plots without infringement, since such matters are ordinarily not protectable.
>
> (d) The doctrine of fair use permits burlesque to go somewhat farther so long as the taking is not substantial. It may take an incident of the copyrighted story, a developed character

(subject to the limited right of an author in certain situations, Loew's Incorporated v. Columbia Broadcasting System, Inc., [note 1]) a title (subject to right of protection under unfair competition, Loew's Incorporated v. Columbia Broadcasting System, Inc., [note 38]) some small part of the development of the story, possibly some small amount of the dialogue.

(e) When burlesque takes more than the matter ordinarily not protected, and referred to above, it runs a calculated risk, that on all the facts involved, a trier of fact may find the taking substantial.

(f) The defense, "I only burlesqued" the copyrighted material is not per se a defense. To hold otherwise would seriously jeopardize rights of property in copyrights and investments in such works, and would ultimately seriously damage the prices to be paid to authors for their literary works . . .

Judge Carter distinguished his holding in *Columbia Pictures Corp.* from his decision in *Loew's* as follows:

> Unlike Loew's, here there was a taking of only sufficient to cause the viewer to recall and conjure up the original. This is a necessary element of burlesque. As Dr. Baxter stated at the trial of *Loew's Incorporated v. Columbia Broadcasting System Inc.*, the defendant has taken a small part and then " '[taken] off into the blue.' "

137 F.Supp. at 351.

In *Bloom & Hamlin v. Nixon*, 129 F. 977, 978 (E.D.Pa. 1903), the Court held that the singing of the chorus of a copyright song, "Sammy," from the "Wizard of Oz" was not an infringement when sung by one mimicking the star of the show, Lotta Faust. The Court held that the chorus of the song was "a mere vehicle for carrying the imitation along" and did not constitute an infringement.

In *Berlin v. E.C. Publications. Inc.*, 329 F.2d 541, 545 (2nd Cir. 1964), the Plaintiffs alleged that "Mad Magazine" by compiling a "collection of parody lyrics to 57 old standards which reflect the idiotic world we live today," infringed upon the copyrights held by the original works. 329 F.2d at 543. The parody lyrics, so that they could be sung, were written in the same meter as the original lyrics, as illustrated by the parody of "A Pretty Girl Is Like a Melody" substituted by "Louella Schwartz Describes Her Malady." The Court of Appeals affirmed the dismissal by the trial court of the original song publisher's claims of infringement. The Second Circuit specifically held:

> We believe in any event that the parody lyrics involved in this appeal would be permissible under the most rigorous application of the "substantiality" requirement. The disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater. In the vast majority of cases, the rhyme scheme of the parodies bears no relationship whatsoever to that of the originals.

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While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up" the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial" taking, if that standard is not to be woodenly applied. Similarly, the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.

In short, we believe that whatever use was made of the plaintiffs' works in this case fell far short of the "substantial" takings which were involved in Benny, even if we were to find the rationale of that opinion persuasive. While the social interest in encouraging the broad-gauged burlesque of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. Cf. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 47 L.Ed. 460 (1903). For, as a general proposition, we believe that parody and satire are deserving of substantial freedom — both as entertainment and as a form of social

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and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

329 F.2d at 545

In *Berlin, supra,* the Court emphasized the failure by the Plaintiffs to "indicate with any degree of particularity the manner in which [commercial] injury might have been inflicted" and found that this tended to weaken the Plaintiffs' claims. The Defendants direct the Court's attention to Counts II and III of Plaintiff's Complaint. The Plaintiff, in the case at bar, has also failed to state with any particularity how the Defendants' use has injured the Plaintiff.

In *Elsmere Music, Inc. v. National Broadcasting Co.,* 482 F.Supp. 741 (S.D.N.Y.), affirmed 623 F.2d 252 (2nd Cir. 1989), held that a skit on the television program "Saturday Night Live" which, the Court of Appeals described as "poked fun at New York City's public relation campaign and its theme song" did not constitute copyright infringement. The Plaintiffs had alleged that the parody "I Love Sodom" infringed on their copyright of the song "I Love New York." The District Court summarized the nature and

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the thrust of the parody:

> The song "I Love Sodom," as well as the sketch of which it was a part, was clearly an attempt by the writers and cast of SNL to satirize the way in which New York City attempted to improve its somewhat tarnished image through the use of a slick advertising campaign.

482 F.Supp. at 745.

District Judge Goettel rejected the Plaintiff's argument that the song "I Love Sodom" and the sketch of which it was a part did not constitute a valid parody of the "I Love New York" advertising campaign. 482 F.Supp. at 745 Judge Goettel then said:

> Having found that SNL sketch and song validly parodied the plaintiff's jingle and the "I Love New York" advertising campaign in general, the Court next turns to the important question of whether such use has tended to interfere with the marketability of the copyrighted work. See *Meeropol v. Nizer, supra,* 560 F.2d at 1070; *Mura v. Columbia Broadcasting System Inc.*, 245 F. Supp. 587, 590 (S.D.N.Y. 1965). In this regard, it is clear to the Court that the defendant's playing of the song "I Love Sodom" has not so interfered. The song has not affected the value of the copyrighted work. Neither has it had — nor could it have — the "effect of fulfilling the demand for the original." *Berlin v. E.C. Publications, Inc., supra,* 329 F.2d at 545. Just as imitation may be

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> the sincerest form of flattery, parody is an acknowledgment of the importance of the thing parodied. In short, the defendant's version of the jingle has not in the least competed with or detracted from plaintiff's work.

Elsmere Music v. National Broadcasting Co., supra, at 747.

The Second Circuit affirmed *per curiam* "on Judge Goettel's thorough opinion", 623 F.2d at 253; but notwithstanding that thoroughness, was moved to append a footnote which reads as follows:

> The District Court concluded, among other things, that the parody did not make more extensive use of appellant's song than was necessary to "conjure up" the original. 482 F.Supp. at 747. While we agree with this conclusion, we note that the concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348, 354 (S.C.Cal. 1955). A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody *builds upon the original,* using the original as a known element of modern culture *and contributing something new for humorous effect or commentary.* (emphasis added).

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In *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), the United States Court of Appeals, Ninth Circuit, held that the defense of fair use could not be applied to the copying of the plaintiff's cartoon characters where the copying was virtually complete or almost verbatim. The Court held:

> . . . it is first important to recognize that given the widespread public recognition of the major characters involved here, such as Mickey Mouse and Donald Duck (see e.g., R. 191-193), in comparison with other characters very little would have been necessary to place Mickey Mouse and his image in the minds of the readers. Second, when the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied. Also, significant is the fact that the essence of this parody did not focus on how the characters looked, but rather parodied their personalties, their wholesomeness and their innocence.

581 F.2d at 757-758.

The Court further held:

> The short answer to this assertion, which would also justify substantially verbatim copying, is that when persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take

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> as much of a component part as they need to make the "best parody." Instead, their desire to make the "best parody" is balanced against the rights of the copyright owner in his original expressions. That balance has been struck at giving the parodist what is necessary to conjure up the original, and in the absence of a special need for accuracy (compare *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977), certiorari denied, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756), that standard was exceeded here. By copying the images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work and these specific attributes that are to be satirized. See Netterville, *Parody, Mimicry and Humorous Commentary*, 35 So.Cal.L.Rev. 225, 238 (1962).

In *MCA, Inc. v. Wilson*, 677 S.2d 180 (2nd Cir. 1981), the United States Court of Appeals, Second Circuit, held that the use of the song "Cunnilingus Champion of Company C" was not fair use under the copyright law of the song "Boogie Woogie Bugle Boy of Company B" where songs were competitors in the entertainment field, and that the infringing song was neither a parody nor burlesque of the original work. The Court specifically held:

> In reaching this conclusion, we have not overlooked the district court's finding that the amount copied form plaintiff's song was so substantial as to be unfairly excessive. Although we might have reached a different conclusion on the same facts, the district court's finding was not clearly erroneous and

> furnishes further support for its holding of infringement. *Rosemont Enterprises, Inc. v. Random House, Inc., supra,* 366 F.2d at 310; *Walt Disney Productions v. Mature Pictures Corp., supra,* 389 F. Supp. at 1398.

677 F.2d at 185.

In both the *Disney* decision and *MCA* decision, the Court found that the Defendants infringed because they substantially copied the original works. In the case at bar, as stated in the Affidavit of the Defendant Campbell, the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," the Defendants only borrows from the original work that amount necessary to conjure up the image of the original work in the mind of the listener. The Defendants have submitted the Affidavits of expert witnesses which support this conclusion.

Disney did not sue the Air Pirates or Mature Pictures to retrieve valuable rights to its works so it could peddle them elsewhere. There has been no licensed parody of the Disney cartoon world or licensed use of the Mickey Mouse song in an obscene movie. On the contrary, the relief desired and obtained by Disney was to bar such uses of its copyrighted material, because they were thought degrading to the ideals represented by the materials. The bout with the "Cunnilingus Champion" was similarly motivated and there are elements of a motive to protect personal sensitivities in the attack by Irvin Berlin on Mad Magazine.

In *Pilsbury Co. v. Milky Way Productions, Inc.*, 215 USPQ 124, 131 (D.C.N.Ga. 1981), the District Court held that Screw magazine's use of the Pilsbury Company's trademark, the Popin' Fresh Doughboy, constituted fair use. The Court held that:

> Although the portrayal is offensive to the court, the court has not doubt that Milky Way intended to make an editorial comment on the values epitomized by these trade characters. The fact that Screw magazine is offered for sale does not compel a contrary conclusion. Social commentary placed in a newspaper or magazine is not put to a commercial use simply because the publication is sold rather than given to the public. The presentation was located on the inside of the magazine, not on the cover where it might be taken more reasonably as an attempt to capitalize on the plaintiff's original work.
>
> The plaintiff suggests that, in addressing this factor, the court should consider the generally salacious content of Screw magazine. The plaintiff seems to believe that a pornographic adaptation of copyrighted works should be accorded less protection under the fair use doctrine than what might otherwise be granted a more continent presentation. The Copyright Act, however, does not expressly exclude pornographic materials from the parameters of the fair use defense, and the plaintiff offers no authority for this protection. The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use.

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In *University of Notre Dame v. Twentieth Century-Fox*, 256 N.Y.S.2d 301, 307 (1965), the Supreme Court of New York held:

> "What seems to one to be trash may have for others fleeting or even enduring values" (Hannegan v. Esquire, Inc., 327 U.S. 146, 158, 66 S.Ct. 456, 462, 90 L.Ed. 586). "everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Winters v. People of State of New York, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840). Accordingly, as intimated at the outset, we may not import the role of literary or dramatic critic into our functioning as judges in this case; and so for purposes of the law we may not reach a conclusion that the works of fiction involve in this litigation are not artistic or literary works. Whether they are creations of merit, whether they have value only as entertainment and no value whatever as opinion, information or education, pose questions which would require us to stake out those elusive lines that we have been warned not to attempt in the cases above cited (see also Molony v. Boy Comics Publishers, 227 App.Div. 116, 171, 98 N.Y.S.2d 119, 123, Van Voorhis, J.). Whether "John Goldfarb, Please Come Home" is a good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it

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> pains or pleases. It is enough that the work is a form of express "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism" (Berlin v. E.C. Publications, Inc., 2 Cir., 329 F.2d 541, 545, cert. den., 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33); and we are not prepared to hold that exercise of the freedom in the instant circumstances infringes on rights which equity should protect.

In *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the Ninth Circuit discussed the fact that very often a parody was critical of the original work. The Court specifically held:

> In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." B. Kaplan, *An Unhurried View of Copyright* 69 (1967). Copyright law is not designed to stifle critics. "'Destructive' parodies play an important role in social and literacy criticism and thus merit protection even though they may discourage or discredit an original author." *Parody Defense*, 96 Harv.L.Rev. at 1411. Accordingly, the economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original — any bad review can have that effect — but rather whether it fulfills the demand for the original.

> Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable. *See, e.g., Air Pirates,* 581 F.2d at 756; *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied,* 379 U.S. 822, 85 S.Ct. 46, 13 L.Ed.2d 33 (1964); *Parody Defense, supra,* at 1409-11.

The "Gaslight" and "From Here to Eternity" cases come the closest to economic motivation on the part of the plaintiff, but even these economic motivations were qualitatively different from those which justify copyright protection. Those cases were elements of a larger competitive struggle between the motion picture industry and the burgeoning new threat to that industry, television. It has been suggested that the Courts, confronted with the tension between the movies and the new entertainment medium, might have played "Robin Hood" to the motion picture interests, that they "might [have] consciously or unconsciously weight[ed] the decisional scale to force bargaining between motion picture companies and television producers with regard to 'salable' aspects of motion pictures.

The Defendants respectfully assert, as supported by the Affidavits of their expert witnesses filed with the Court, that the parody and the copyrighted work do not compete. Although the Defendants' version is for commercial gain, the sale of the Defendants' version will not, in any way, reduce the economic value of the Plaintiff's work. (See Affidavits of William Krasilovsky and Oscar Brand.) In *Hill v. Whalen*, 220 F. 359, 360 (S.D New York 1914), the Court held that:

> One test which, when applicable, would seem to be ordinarily decisive, is whether or not so much has been reproduced as will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. A word of explanation will be here necessary. The reduction in demand, to be a ground of complaint, must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing, could not give any right of action for infringement of copyright.

In *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2nd Cir. 1966), the Court held:

> Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e., the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the Hughes biography failed to recognize that "[a]ll publications presumably are operated for profit * * *." *Koussevitzky v. Allen-Towne & Health,* 188 Misc. 479, 483, 68 N.Y.S.2d 779, 783, aff'd,

272 App.Div. 759, 69 N.Y.S.2d 432 (lst Dept. 1947), and that "both commercial and artistic elements are involved in almost every [work] * * * " Note, 56 Column.L.Rev. supra at 597. Thus, we conclude that whether an author or publisher has a commercial motive or writes in a popular styled is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use. *Cf. Koussevitzky v. Allen. Towne & Health*, 68 N.Y.S.2d supra, 782-784 (construing N.Y. Civil Rights Law, McKinney's Consol. Laws, c. 6, section 51).

The question of whether or not the Defendants' version of "Oh, Pretty Woman," "Pretty Woman," constitutes "fair use" under 17 U.S.C. Section 107 is a question for the Court. *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986). A review of the four factors articulated by Congress, previously judicially determined, results in a finding that as a matter of law the Defendants did not infringe upon the Plaintiff's copyright because of the doctrine of fair use.

5. AS A MATTER OF LAW THE PLAINTIFF'S ALLEGATIONS OF INTERFERENCE WITH BUSINESS RELATIONSHIPS AND INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE MUST BE DISMISSED.

The Plaintiff has alleged in Count II and Count III of its Complaint that the Defendants' parody constitutes an interference with business relations and interference with prospective business advantage of the Plaintiff. It is assumed that these allegations are

based upon Tennessee state law. 17 U.S.C. Section 301 clearly preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter as specified by Sections 102 and 103 . . ."

Plaintiff's composition obviously comes within the scope of copyrightable works of authorship and is fixed in a tangible medium of expression. The test of whether the rights claimed are preempted is "if under state law the act of reproduction, performance, distribution or display will in itself infringe the state created right, then such right is preempted." *Nimmer On Copyright*, Section 1.01[b]. The Defendants respectfully assert that Counts II and III allege nothing more than "unlicensed copying and commercial exploitation" of its version of "Oh, Pretty Woman." The Plaintiff fails to even suggest how the Defendants' parody will interfere with its original work.

In *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986), the Ninth Circuit discussed the preemption by federal law. The Court held:

> Assuming arguendo that the false claiming of authorship constitutes a separate tort under California law, such a cause of action is nevertheless preempted by federal law. In *Compco Corp. v. Day- Bright Lighting, Inc.*, 376 U.S. 234, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964), and *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964), the Supreme Court determined that the Supremacy Clause of the United States Constitution, U.S. Const., art. Vi, precludes the states from protecting types of intellectual

property that are already covered by the federal copyright or patent laws. *Sears* and *Compco* "ma[k]e it very clear that just as a state could not encroach upon the federal patent laws directly it could not do so indirectly under the guise of enforcing its laws against unfair competition where those laws would clash with the federal objectives." *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711, 717 (9th Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S. Ct. 1376, 28 L.Ed.2d 646 (1971). The same applies to the copyright statute. Accordingly, the kind of misappropriation alleged by the composers can be redressed, if at all, only under federal law.

The allegations contained in Counts II and III of the Plaintiff's Complaint are precisely the acts protected by the Copyright Act. Therefore, Counts II and III of the Plaintiff's Complaint fail to state a cause of action upon which relief can be granted because such state remedies are not available because they are preempted by the Copyright Act.

IV

CONCLUS ION

The Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted because, as of a matter of law, the Defendants parody version of "Oh, Pretty Woman" constitutes fair use in accordance with 17 U.S.C. Section 107. Further, Counts II and III of the Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be

granted because the Plaintiff's exclusive remedy is under the Copyright Act, 17 U.S.C. Section 101 et seq., which preempts all equivalent state legal and equitable remedies.

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEY FOR DEFENDANTS

Appendix E

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX F — MOTION TO DEPOSIT FUNDS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524

JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO DEPOSIT FUNDS

Come now the Defendants, by and through their attorneys, and, in accordance with Rule 67 of the Federal Rules of Civil Procedure and Local Rule 13 of the United States District Court for the Middle District of Tennessee, move to deposit with the Court a check made payable to the United States District Court for

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the Middle District of Tennessee in the amount of $13,867.56. The Defendants would state that this payment constitutes all monies owed by the Defendants to the Plaintiff in the above-captioned case in accordance with the statutory rate established by the Copyright Act, 17 U.S.C. Section 101, et seq. The Defendants rely upon the Affidavit of Luther Campbell filed with the Court to establish the amount owed by the Defendants to the Plaintiff. The Defendants have contemporaneously filed with the Court, as required by Rule 67 of the Federal Rules of Civil Procedure and Local Rule 13, an Order permitting the deposit of these funds with the Court.

Respectfully submitted,

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX G — AFFIDAVIT OF LUTHER CAMPBELL SWORN TO JULY 31, 1990 WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

PART I

COMES NOW the Affiant and makes oath as follows:

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1. My name is Luther Campbell, and I am a citizen and resident of the State of Florida. I am over the age of eighteen (18) years of age.

2. In May, 1989, I wrote a parody of the song "Oh Pretty Woman" which I entitled "Pretty Woman". In writing the parody I felt it was necessary for the listener to identify the parody version with the original version written and performed by the late Roy Orbison. In writing the lyrics to the parody and selecting the accompanying *score* it was a critical factor that I determine what amount of the original work would be included in the parody. I chose to include the distinctive introduction of the original version of "Oh Pretty Woman" and the first line of lyrics because I felt this was sufficent for the listeners to identify the parody with the original work.

3. The parody "Pretty Woman" was an attempt on my part, through comical lyrics, to satirize the original work "Oh Pretty Woman", written and performed by Mr. Orbison.

PART II

1. On July 5, 1989, Linda Fine, General Manager of Luke Records f/k/a Luke Skyywalker Records, wrote Gerry [Gary] Teifer of Opryland U.S.A., Inc., and Acuff-Rose Music, Inc. Attached as Exhibit A to my Affidavit is a copy of that correspondence. The purpose of Ms. Fine's letter was to advise Acuff-Rose Music, Inc. of the intent of The 2 Live Crew to write and perform a parody of the song "Oh Pretty Woman" originally written and performed by Roy Orbison, for which Acuff-Rose Music, Inc. held the copyright. Ms. Fine enclosed with her correspondence "a copy of the lyrics, so that you may see their satirical parody, very similar in vein to what Wierd Al Yankovic

Appendix G

and other satirical artists are doing". (Exhibit A) Ms. Fine indicated that Acuff-Rose Music, Inc. would be acknowledged as the owner of the song and that the Defendants would pay the statutory rate for its use. Ms. Fine also indicated that the parody would be included on a novelty record and that it would by "heard by hundreds of thousands of new listeners in their homes". (Exhibit A)

2. On July 17, 1989, Gerry Teifer, of the Opryland Music Group, Inc. and Acuff-Rose, Music, Inc., wrote Linda Fine, General Manager of Luke Records, formerly known as Luke Skyywalker Records. Attached as Exhibit B is a copy of that correspondence. Mr. Teifer, as agent for the Plaintiff, indicated that "I must inform you that we cannot permit the use of a parody of "Oh Pretty Woman". (Exhibit B)

4. In June, 1989, Luke Records, formerly known as Skyywalker Records, released "As Clean As They Want to Be" which included "Pretty Woman" the parody of "Oh Pretty Woman" referenced in Ms. Fine's correspondence attached hereto as Exhibit A.

5. The Defendants did acknowledge Acuff-Rose Music, Inc.'s ownership interest in the song and the authorship of Mr. Orbison and Mr. Dees. Attached as Exhibit C is a photocopy of the compact disc cover which acknowledges these rights of the Plaintiff. "As Clean As They Want To Be" had moderate success in the market place, with combined sales of 248,000 units of albums, cassettes and compact discs. The Plaintiff, as the copyright owner of "Oh Pretty Woman" is entitled to be compensated the statutory rate for the combined sales of albums, cassettes and compact discs. An accounting has been performed by Luke Records, formerly known as Luke Skyywalker Records, to determine the amount of money owed to the Plaintiff. This amount is $13,867.56. Attached

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as Exhibit D to my affidavit is a photocopy of a check made payable to the Plaintiff in the amount of $13,867.56 to compensate the Plaintiff for the combined sales of "As Clean As They Want To Be" for the inclusion of the parody "Pretty Woman". This check has been tendered to the Plaintiff through the United States District Court for the Middle District of Tennessee as was originally offered in Ms. Fine's correspondence dated July 5, 1989 (Exhibit A).

6. That all correspondence referenced above was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that it could be released if so desired.

Further the Affiant sayeth not.

s/ Luther Campbell
LUTHER CAMPBELL

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 31 DAY OF JULY, 1990.

s/ Melanie I. Kerr
NOTARY PUBLIC, State of Florida

Appendix G

EXHIBIT A — LETTER OF JULY 5, 1989

July 5, 1989

Gary Teifer
Opryland, USA
P.O. Box 121900
Nashville, TN 37312-1900

RE: "Pretty Woman"

Dear Mr. Teifer:

As the General Manager of Skyywalker Records, I would like to inform you of "Two Live Crew's" desire to do a parody on the above captioned song.

In the event you have not hear of this group, they are one of the most successful rap groups in the country today. This LP will be their third release and the previous two have gone Gold and are close to Platinum.

At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain to what Weird Al Yankovic and other satirical artists are doing.

We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a

novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Sincerely,

Linda Fine
General Manager

Encl.
(cassette/lyric sheet)

EXHIBIT B — LETTER OF JULY 17, 1989

OPRYLAND MUSIC GROUP

ACUFF-ROSE MUSIC, INC.

MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,

s/ Gerry Teifer
Gerry Teifer

GT/jmm

Appendix G

EXHIBIT C — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging)

Appendix G

EXHIBIT D— PHOTOCOPY OF CHECK

(Omitted Here But Submitted Separately As Lodging)

Appendix G

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 1 day of August, 1990.

s/ Alan Turk
ALAN MARK TURK

APPENDIX H — AFFIDAVIT OF M. WILLIAM KRASILOVSKY SWORN TO JULY 31, 1990 WITH EXHIBIT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

Acuff-Rose Music Inc.

Plaintiff

vs.

Luther R. Cambell a/k/a Luke Skywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx

p/k/a The 2 Live Crew

and Luke Skywalker Records

Defendants

AFFIDAVIT

M. William Krasilovsky, an attorney at law, duly admitted to practice in the states of New York and Alaska and in federal courts affirms upon penalty of perjury as follows:

1. I am an attorney specializing in the field of entertainment law with a particular emphasis upon music copyright. I have been in this field since 1953 and attach hereto as Exhibit "A" my resume.

2. As co-author of the text "This Business of Music" published by the leading trade paper of the music industry, *Billboard*, I have stated the following concerning what is considered to be an "answer song" in the industry and its relationship to the doctrine of "fair use:" (pages 142-145)

> "The music industry has for many years contained "answer songs," which have been common in the country and western and rhythym and blues fields — areas that are now part of the pop music business. An original song might have been entitled, for example, "We always Walk in the Rain." If this should achieve success, another writer might shortly thereafter pen a song called, "We Never Walk in the Rain," as a humorous reply to an aftermath of the former song."

In addition, regarding fair use and parody (page 144):

> "Parody and burlesque of a copyrighted work are dependent on fair use and require caution. Mad Magazine was upheld by a Federal Circuit Court of Appeals in its defense of parodies, such as "The Last Time I Saw Paris," on the ground of fair use for humorous critical purposes. The court's decision pointed out that the copying did not exceed the amount required to recall reasonably and evoke in the reader the original version being parodied. . . ."

Page 143 of "This Business of Music" discusses the precedent of "Jesus Christ Superstar." Applying the factors therein designated, I note most emphatically that 2 Live Crew's work in the instant action cannot be considered a substitute for Plaintiff's work and is not in competition with Plaintiff's work.

3. I have been furnished with authentic copies of the two songs in question in the instant action, namely, "Oh Pretty Woman," as

recorded by Roy Orbison, and "Pretty Woman" as recorded by 2 Live Crew and have made the following observations:

a. The recent recording of 2 Live Crew utilizes an accompaniment throughout and in introductory melodic and lyric segment, which is designed to and accomplishes, an evocation of "Pretty Woman" as recorded by Roy Orbison.

b. It proceeds to parody and satirize the original composition in a true "answer song" format by altering the physical attributes of the subject woman; a pleasing image of feminine beauty becomes bald-headed, hairy and generally repugnant. A particular note is the phrase, "the baby ain't mine" which would be completely inconsistent with the tone and story line of the original song,

c. The widespread publicity and news coverage involving 2 Live Crew, as well as my personal observation from hearing the recording, lead me to the conclusion that the intended audience for the two songs is entirely different. In other words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version.

d. In summary, it appears that the effectiveness of the satire required some evocation of the original, but that the line between infringement and fair use was not exceeded.

e. In presenting this affidavit, I should add the note that I do not purport to be a musicologist or music critic, and that the opinions expressed above are not in such claimed capacity.

s/ M William Krasilovsky
M. William Krasilovsky

Appendix H

Sworn to before me
this 31st day of July, 1990

s/ Andrew J. Feinman
Notary Public

Appendix H

EXHIBIT A — RESUME

M. William Krailovsky, Esq.
51 E. 42nd Street, Suite 1601
New York, New York 10017

M. William Krasilovsky is a partner in the firm of Feinman & Krasilovsky, specializing in music and entertainment matters. In addition to the estates of Rachmaninoff, Buddy De Silva, Ray Henderson and Fats Waller the firm also represents or has represented classic industry figures such as Aretha Franklin, Paul Anka, Burt Bacharach, Chuck Berry as well as numerous composers, publishers, recording artists, producers, studios and record companies. Mr. Krasilovsky has represented Warner Brothers publishing companies and the American Guild of Authors and Composers, has served as officer and/or director of a number of music publishing companies such as Weil-Brecht Harms Music Corporation, Peppamar Music, Inc., thus enjoying constant involvement in the negotiation and review of financial matters of such companies and their dealings with ASCAP and BMI.

Additionally, Mr. Krasilovsky is co-author of the books, "THIS BUSINESS OF MUSIC" and "MORE ABOUT THIS BUSINESS OF MUSIC," published by Billboard, the leading trade paper of the music industry. Both books have been recognized as leading reference texts by the American Library Association and ASCAP, as well as being respectfully referred to as the "bible" of the music business by working musicians and others involved in the industry.

Extremely specialized as to copyright law, Mr. Krasilovsky has been published on this subject by Columbia Teacher's College, the Copyright Society and the Performing Arts Review and has lectured at the Practicing Law Institute, Yale University, Columbia

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University, University of Miami, New York University, Cornell University, and Brigham Young University.

Within recent years, Mr. Krasilovsky has been engaged as an expert witness in a number of litigations in various courts involving the music industry as a specialist in entertainment law. As such, he was presented by the Record Industry Association of America and was quoted favorably on appeal.

Having graduated Cornell University in 1947 and Cornell Law School in 1949 Mr. Krasilovsky has been adjunct professor at New York University during the past three years, teaching a course in ethics in the entertainment business.

APPENDIX I — MOTION TO CONVERT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524

JUDGE WISEMAN

JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a

THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO CONVERT DEFENDANTS' MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Acuff-Rose Music, Inc. (Acuff-Rose), and moves this Court to designate the pending motion to dismiss a motion for summary judgment, as provided by Federal Rule of Civil Procedure 12(b). In support of this motion Acuff-Rose states:

Appendix 1

1. On August 1, 1990, Defendants filed a motion denominated Motion to Dismiss.

2. The Defendants' Motion to Dismiss presents materials outside the pleadings, including affidavits, making treatment as a motion for summary judgment appropriate under Federal Rule of Civil Procedure 12(b). Although Defendants captioned their motion as a Motion to Dismiss, Defendants acknowledge that their motion is one for summary judgment on pp. 3-4 of the Memorandum in Support of Defendants' Motion to Dismiss.

3. According to the Certificate of Service attached to the Defendant's Motion to Dismiss, a copy was served on Acuff-Rose by mail on August 1, 1990. On August 3, 1990, Counsel for Defendants informed Acuff-Rose that a copy had not yet been mailed because Defendant's counsel was waiting on an additional affidavit. Acuff-Rose obtained a copy of the Motion to Dismiss by sending a messenger to pick up a copy on August 4, 1990.

4. Defendants' Motion to Dismiss was filed without one of the supporting affidavits. This affidavit was filed on August 3, 1990, but never served on Plaintiff. Acuff-Rose obtained a copy of this filed affidavit from the clerk of the court on August 8, 1990 .

5. Pursuant to Rule 8(b) of the Local Rules of Court, if the pending motion is treated as a motion to dismiss, Acuff-Rose's response is due on August 22, 1990; if as a motion for summary judgment, on August 28, 1990.

THEREFORE, Acuff-Rose moves this Court to ORDER that Defendants' pending motion to dismiss be converted to a motion for summary judgment and be decided in conformity with Rule 56 of the Federal Rules of Civil Procedure and that Acuff-Rose shall

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have until August 28, 1990, in which to respond to the pending motion.

Respectfully submitted,

KING & BALLOW

By s/ E. Andrew Norwood
Alan L. Marx
Elizabeth B. Marney
E. Andrew Norwood
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue North
Nashville, TN 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Appendix I

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of August, 1990, a true and exact copy of the foregoing was served on Defendants by placing a copy in the U.S. Mail, first class postage prepaid addressed to:

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

Sanford R. Ross
1319 16th Avenue South
Nashville, TN 37212

Alan M. Turk, Esq.
3310 West End Avenue
Nashville, TN 37203

s/ E. Andrew Norwood
E. Andrew Norwood

APPENDIX J — ORDER ALLOWING DEPOSIT OF FUNDS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

ORDER

The Defendants have moved, in accordance with Rule 67 of the Federal Rules of Civil Procedure and Local 13 of the United States District Court for the Middle District of Tennessee, to deposit $13,867.56 with the Court. The Defendants have alleged that this payment constitutes all monies owed by the Defendants to

Appendix J

the Plaintiff in accordance with the statutory rate established by the Copyright Act, 17 U.S.C. Section 101, et seq.

IT IS HEREBY ORDERED that the Defendants deposit with the Court $13,867.56. The Court will hold these funds during the pendency of this litigation or until such time as the Court determines said funds should be released to one of the parties. These funds will be automatically be rolled over into an interest bearing account unless otherwise ordered by the Court.

IT IS FURTHER ORDERED that counsel presenting this Order serve a copy thereof on the Clerk of this Court or his chief deputy personally. Absent the aforesaid service, the Clerk is hereby relieved of personal liability relative to compliance with this Order.

IT IS FURTHER ORDERED that counsel has designated that these funds be deposited in an interest bearing checking account at First American National Bank, First American Center, Nashville, TN 37201, in the name of the Clerk of the United States District Court for the Middle District of Tennessee.

IT IS FURTHER ORDERED that the Clerk has heretofore given notice to the parties that a fee will be deducted from the account pursuant to 54 Fed.Reg. 20497 (May 11, 1989). The Clerk is, therefore, directed to deduct an amount equal to the income earned and credited to the investment account for the first 45 days of income earned, and to deposit that amount in the United States Treasury.

ENTERED this __ day of August, 1990.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.

APPENDIX K — RESPONSE TO MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S RESPONSE TO THE MOTION TO DISMISS

COMES NOW the Plaintiff, Acuff-Rose Music, Inc. (Acuff-Rose), and submits this response to the Motion to Dismiss filed by the Defendants. The Motion to dismiss filed by Defendants contained affidavits that converted that motion to a Motion for Summary Judgment. In support of this response, Acuff-Rose has attached supporting declarations.

Appendix K

I. FACTS

Acuff-Rose is a Tennessee corporation that maintains offices and does business in the Middle District of Tennessee. The individual Defendants are collectively known as The 2 Live Crew, a professional musical group that performs "rap" music. The group does business in the Middle District of Tennessee. Defendant Skyywalker Records is a corporation organized under the laws of the State of Florida, with its principal place of business in Miami, Florida. Skyywalker Records does business in the Middle District of Tennessee.

Roy Orbison and William Dees were co-authors of an original musical work entitled "Oh, Pretty Women," which was registered for copyright protection on August 26, 1964, under copyright Reg. No. EP-191739. Orbison and Dees assigned their rights in "Oh, Pretty Woman" to Acuff-Rose in 1964.

The musical composition "Oh, Pretty Woman" immediately enjoyed commercial success and has remained a popular work to this day. Acuff-Rose continues to collect substantial revenues from domestic and foreign licensing of "Oh, Pretty Woman." Although receiving frequent licensing requests for "Oh, Pretty Woman," Acuff-Rose has zealously protected the copyright and has only allowed licenses that were consistent with good taste and that furthered the value of the property. License requests are granted pursuant to Acuff-Rose's long range plans for appropriate exploitation of "Oh, Pretty Woman." Typically, denied requests are not consistent with these long range plans and/or good taste or retain a risk of disparaging the future value of "Oh, Pretty Woman."

The song "Oh, Pretty Woman" has been frequently recorded

Appendix K

and widely disseminated. Defendants had access to "Oh, Pretty Woman." On July 5,1989, Defendants, through their agent, requested a license to create a derivative work based on "Oh, Pretty Woman." On July 17, 1989, Acuff-Rose sent a letter informing Defendants that the license would not be granted.

On or about July 15, 1989, Defendants released a record album entitled *As Clean As They Wanna Be*. One of the songs on *As Clean As They Wanna Be* is a musical work entitled "Pretty Woman." The liner notes and label on the album list the title of the song as "Pretty Woman" and state that it was "Written By: Roy Orbison and William Dees" and published by "Acuff-Rose (BMI)."

On July 16, 1990, Acuff-Rose filed a complaint against the defendants claiming copyright infringement, interference with business relations, and interference with prospective business advantage. On August 3, 1990, Defendants filed a motion denominated as a Motion to Dismiss. The motion filed by Defendants contained supporting materials, and, as Defendants admitted on pages 3 and 4 of their Memorandum in Support, was in fact a motion for summary judgment. *See* Rule 12(c), Fed. R. Civ. P.

II. LEGAL STANDARD

A. Motions for Summary Judgment

A summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the burden of proving that there is no genuine issue of material fact to be tried. Fed. R. Civ. P. 56, *Celotex Corp. v.*

Catrett, 477 U.S. 317 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 106 S. Ct. 2505, 2510 and 2514, 91 L. Ed. 2d 202 (1986); *Pachla v. Saunders System, Inc.*, 899 F.2d 496, 498 (6th Cir. 1990). Furthermore, " '[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.' " *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 578, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)); *Historic Preservation Guild of Bay View v. Burnley*, 896 F.2d 985, 993 (6th Cir. 1989). *See also S & H Computer Systems, Inc. v. SAS Institute, Inc.*, 568 F. Supp. 416 (M. D. Tenn. 1983) (Motion for summary judgment denied in copyright infringement case because genuine issues of fact existed regarding the alleged similarity of the two computer programs). In considering the motion, the Court must draw all reasonable inferences from the Complaint. *Walker Process Equipment, Inc. v. Ford Machinery and Chemical Corp.*, 382 U.S. 172, 174-74, 86 S. Ct. 347, 349, 15 L. Ed. 2d 247 (1965).

As is set forth below, Defendants' motion in this action must fail because genuine issues of material fact exist as to whether the use made by Defendants was a parody and whether that use was a fair use as that term is used in § 107 of the Copyright Act.[1]

B. Copyright Infringement

In order to prove a claim of copyright infringement, the plaintiff must show ownership of a valid copyright and copying by

1. Acuff-Rose points out that the Defendants filed their motion prior to the taking of any discovery in this matter.

the defendant. *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 52 (2d Cir. 1989). Copying is ordinarily established indirectly by plaintiff's proof of access by the defendant and substantial similarity of the two works. *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). Showing ownership of "valid, existing copyrights . . . automatically establishes that Plaintiffs have the exclusive right to prepare derivative works based on the copyrighted work, 17 U.S.C. § 106(2); and that Plaintiffs are entitled to prevent any unauthorized 'musical arrangement or any other form in which the work may be recast, transformed or adapted.' " *MGM v. Showcase Atlanta Coop. Prods.*, 479 F. Supp. 351, 355-56 (N.D. Ga. 1979).

"The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S. Ct. 2040, 2043, 45 L. Ed. 2d 84 (1975)). To raise their parody defense, Defendants have admitted access, substantial similarity, and copying.

III. ARGUMENT

A. A genuine issue of material fact exists as to whether Defendants' derivative work is a parody.

1. The Defendant's Work is not a Parody of the Copyrighted Work

The Defendants in this case have asserted that they were privileged to infringe Acuff-Rose's copyright because they created a derivative work that was a parody of the copyrighted work. A

genuine issue of material fact exists as to whether the derivative work prepared by Defendants is a parody.

Defendants contend that Acuff-Rose has "admitted" that their use was a parody. Acuff-Rose has never made this admission. The letter from Gerald Teifer that purportedly contains the admission simply does not say what Defendants have claimed. Moreover, parody is a term of art in the music industry, and the word has a number of different meanings, some of which differ from the meaning used by courts in considering a "parody" defense. The term "parody" is used generically to describe any use in which a copyrighted musical work has new lyrics created for it. (Teifer Declaration at ¶ 8). Defendants' use is a parody under this definition, and Teifer's letter said Acuff-Rose would *not* license "the use of a parody of 'Oh, Pretty Woman.' "

Parody has another, more specific meaning, relating to satire or burlesque. Legal opinions referring to a "parody" defense refer only to this meaning. Acuff-Rose does not admit and has never admitted that Defendants' use is a parody under the legal definition. The agent of Acuff-Rose, Gerald Teifer, who purportedly made the "admission," never heard the Defendants' derivative work at issue in this case before he wrote his letter. (Teifer Declaration at ¶ 5). Therefore, he admitted nothing about the nature of the infringing work.

In *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y. 1979), the court defined parody in the burlesque sense discussed above. "A parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule." This definition has been cited and refined by other courts. In *MGM v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (N.D. Ga. 1979), the court held:

> [I]n order to constitute the type of parody eligible for fair use protection, parody must do more than merely achieve comic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist — thereby giving the parody social value beyond its entertainment function. Otherwise, any comic use of an existing work would be protected, removing the "fair" aspect of the "fair use" doctrine and negating the underlying purpose of copyright law of protecting original works from unfair exploitation by others.

Accord, New Line Cinema Corp v. Bertlesman Music Group, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988).

Based on these definitions, a genuine issue of material fact exists as to whether the work in question even meets the legal definition of parody or is the type of parody eligible for fair use protection. The Defendants argue that their work achieves a comic effect. However, whether the infringing work makes any statement at all about the original work is an open factual question for the Court to decide. The conclusions in the Defendants' affidavits, untested by discovery or cross-examination, fall short of leaving this material fact undisputed.

To qualify for consideration as a parody, a work must be purposefully constructed as a parody. *D.C. Comics v. Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984). "Parody in its proper role creates something new by drawing from the old; but when it has the effect of refashioning or destroying the old, it is not protected . . . Trading upon the imagination and originality of another is not fair use."

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The Defendants have submitted an affidavit that claims their use was intended as a parody. However, this conclusory, self-serving statement has not been tested by compliance with discovery or cross-examination. In spite of Defendants' contentions, a determination that there is no genuine issue as to this material fact would be at best premature. The Defendants' infringing work has refashioned the copyrighted work and has traded on the imagination and originality of the original authors. Because a genuine issue of material fact exists as to whether this use is a parody, the Motion to Dismiss is due to be denied.

To be considered a parody, the work must also comment, at least in part, on the work parodied. *Wilson*, 425 F. Supp. 443, *affd.*, 667 F.2d 180 (2d Cir. 1981); *Walt Disney Prod. v. Mature Picture Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 n.15 (9th Cir. 1978); *accord* 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90.9 (The second circuit went too far in *Elsmere* in "suggesting an open-ended standard whereby wholesale appropriation of another's work becomes possible under the banner of fair use provided only that elements of humor are added"). In *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988), plaintiffs charged that defendant's music video entitled "A Nightmare on My Street" infringed their copyrighted movie *A Nightmare on Elm Street*. The *New Line* court accepted the *Showcase* district court's definition of parody, *Id.*, at 1525, and granted the plaintiff's motion for a preliminary injunction because the court had "serious doubts" as to whether defendant's music video constituted parody under the accepted definition: the video did not "appear to make a critical comment or statement about [the movie] reflecting a unique perspective . . . [T]he video [served] solely an entertainment and promotional function for [defendant's] song." *Id.* at 1525.

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A genuine issue as to this material fact exists. The derivative work created by Defendants does not comment on the copyrighted work. The Defendants' work is primarily about the physical attributes of women. An examination of the lyrics of the copyrighted work demonstrates that it is not about the physical attributes of women. Rather, the copyrighted work is primarily about loneliness.

If the work in question is not a parody, it is an unauthorized derivative work, unquestionably prepared without permission of the copyright owner. Preparation of a derivative work is one of the exclusive rights guaranteed to a copyright owner. 17 U.S.C. § 106 (2). *See e.g. D.C. Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984); *MGM v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351 (N.D. Ga 1979). This copying by the Defendants is an unjustifiable appropriation. The Motion to Dismiss should be denied.

2. Defendants Appropriated Too Much of the Copyrighted Work to Claim a Parody Defense

Even assuming, *arguendo*, that the Defendants' infringing work is a parody, a point Acuff-Rose specifically denies, a genuine issue of material fact exists as to whether Defendants' taking of the copyrighted work is so substantial as to be improper.

One of the earliest cases involving this issue was *Columbia Pictures Corp. v. National Broadcasting Corp.*, 137 F. Supp. 348 (S.D. Cal. 1955). The case involved a parody by Sid Ceasar of the movie *From Here to Eternity*. In *Berlin*, the court articulated what has become known as the "recall or conjure up" test.

Since a burlesquer must make a sufficient use

> of the original to recall or conjure up the subject matter being burlesqued, the law permits more extensive use of the protectable portion of a copyrighted work in the creation of a burlesque of that work than in the creation of other fictional or dramatic works not intended as a burlesque of the original.

Id. at 354.

This standard was later adopted and refined by the Second Circuit in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). In that case the court held:

> Where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

The Ninth Circuit altered the standard somewhat in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978). The court held that the purported parodist had taken too much of the Walt Disney characters defendant claimed to be parodying.

> When persons are parodying a copyrighted work, the constraints of the existing precedent do not permit them to take as much of a component part as they need to make the "best parody." Instead their desire to make the "best parody" is balanced against the rights of the copyright owner in his original expressions.

In spite of these cases, the Second Circuit took a much different view of the parody standard in the later case of *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980), In a footnote to its opinion, the court stated that a more extensive use than that adopted by the recall or conjure up test might be proper. This footnote has been roundly criticized. *See, e.g.*, 3 M Nimmer, *Nimmer on Copyright* § 13.05[C] (expressing concern that this interpretation of the fair use doctrine could allow wholesale appropriation as long as humorous elements were added); W. Patry, *The Fair Use Privilege in Copyright Law* 165 (1985) (parodist may take more than necessary to conjure up, but runs risk of a finding that the infringing use was not a fair use). The Second Circuit quickly retreated from this standard in *Warner Brothers Music v. American Broadcasting, Co. Inc.*, 654 F.2d 204, 211 (2d Cir. 1981). In that case, the Second Circuit held:

> Suffice it to say that while the [parody] defense might be applicable to those *isolated instances* in which a nearly identical line from the plaintiffs' script, or express reference to one of the plaintiffs' characters was made, we question whether the defense could be used to shelter an entire work that is substantially similar [to] and in competition with the copyrighted work.

(emphasis added).

In the instant case, there is a genuine issue as to the material fact of whether Defendants used more of the copyrighted work

than was necessary to recall or conjure up "Oh, Pretty Woman." The appropriation of the music of "Oh, Pretty Woman" was substantial. (Spielman Declaration at ¶ ¶ 5 & 9). The Defendants have acted to capitalize on the widespread recognizability of the music and lyrics of "Oh, Pretty Woman." This work was a hit song when released by Roy Orbison and has become a standard that continues to generate substantial revenue including its current use in a successful motion picture under a license. (Teifer Declaration at ¶ 10). As such, it would take very little to conjure up "Oh, Pretty Woman" in the mind of the listener. Just as in the *Air Pirates* case, the Defendants' purpose here was to cash in on the widespread recognition of the copyrighted work.

The right of the Defendants to create a parody must be "balanced against the right of the plaintiff in its original expression. That balance has been struck at giving the parodist only what is necessary to conjure up the original." *Air Pirates*, 581 F.2d at 758. Where the infringer takes more than is necessary to conjure up the original, that balance tips in favor of a finding of infringement. *See D.C. Comics*, 598 F. Supp. 110, 118; *Air Pirates*, 581 F.2d at 751; *Berlin*, at 541; *Wilson*, 677 F.2d at 184-85.

The Defendants rely heavily on *Elsmere* and on *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), which relied on *Elsmere*. However, as noted above, the suggested standard set out in *Elsmere* has been largely criticized and subsequently limited in *Warner Brothers* by the very circuit court that created it. The Defendants fail to mention this point.

The case of *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), on which Defendants rely is distinguishable. In that case, the defendants used only 6 bars of a 38-bar copyrighted musical work. Here, the taking was much more substantial. (Spielman

Declaration at ¶ ¶ 6 & 7). Even the affidavit of Defendants' purported expert acknowledges that the Defendants' version uses the following: The copyrighted "4/4 drum beat introduction;" a widely recognizable bass riff at least 10 times; the chorus "Pretty Women"; and the work's original melody. As admitted in the affidavit, the Defendants' version uses 55 bars taken from the copyrighted work, including the original melody.

The Defendants exceed the bounds of use allowed by the courts by taking a substantial portion of "Oh, Pretty Woman" including its opening rhythm section, its highly recognizable bass riff, its melody line, its title, and part of its chorus. (Spielman Declaration at ¶ 7). The *Fisher* use made up 29 seconds of a 40 minute work. The infringing use of "Oh, Pretty Woman" by The 2 Live Crew was much more extensive. (Spielman Declaration ¶¶ 6-8). There is a genuine issue as to the material fact of whether Defendants' taking is too extensive to qualify for protection, assuming, *arguendo*, that their use is a parody at all.

Also, in the *Fisher* case, the defendants did not misrepresent their work as the original copyrighted work. Through their use of the names of Roy Orbison, William Dees, and Acuff-Rose, the Defendants have represented to a potential purchaser that they are using the original copyrighted material. The label and album contain no indication that the work is a "parody." A genuine issue of material fact exists with regard to whether the Defendants have made too extensive a use of the copyrighted work. Therefore, the motion should be denied.

B. A genuine issue of material fact exists as to whether the use made of "Oh, Pretty Woman" by The 2 Live Crew is a fair use under § 107 of the Copyright Act.

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1. The Legal Standard Applicable to a Fair Use Question

To promote the widespread dissemination of ideas, the copyright system is designed to assure contributors to the store of knowledge a fair return for their labors. *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 546, 105 S. Ct. 2218, 2223, 85 L. Ed. 2d 588 (1985). To assure this fair return, the Copyright Act grants copyright holders a limited monopoly to take certain actions with regard to their works. *See* 17 U.S.C. § 106. Among these is the exclusive right to create a derivative work based on the copyrighted work. *Id.* A derivative work is "a work based upon one or more preexisting works, such as a . . . musical arrangement, sound recording, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101. In this case, the Defendants have unquestionably created a derivative work by making a musical arrangement, sound recording, and adaptation of "Oh, Pretty Woman."

The judicially created doctrine of fair use carves out a limited exception to the exclusive rights guaranteed to authors by § 106 of the Copyright Act. Fair use is now codified in § 107 of the Copyright Act. This section sets out the standard for determining whether a particular use is fair:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement

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> of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The Defendants, in their Motion to Dismiss, have attempted to blur the distinction between parody and fair use, apparently contending that any parody use is presumptively a fair use. The cases make it clear, however, that the exact opposite is the law: a parody is not presumptively a fair use. *Fisher v. Dees* 794 F.2d 432, 435 (9th Cir. 1986). "Parody was not classified as a *presumptively* fair use . . . Each assertion of the 'parody defense' must be considered individually, in light of the statutory facts, reason, experience, and, of course, the general principles developed in past cases." *Id.* (emphasis in original). *See also New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1525 (S.D.N.Y. 1988). Therefore, even assuming, *arguendo*, that the Defendants can prove that their use is a parody, a point Acuff-Rose

specifically denies, they still must prove that their parody use was a fair use as that term is defined in § 107 of the Copyright Act. A genuine issue of material fact exists as to whether the Defendants' use was fair.

The question of whether a particular use is fair is a mixed question of law and fact. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560, 105 S. Ct. 2218, 2230, 85 L. Ed. 2d 588 (1985). Only when the District Court has found facts sufficient to evaluate each of the four factors set out in § 107 may it conclude as a matter of law that the challenged use is or is not a fair use. *Id.* In this case, the facts thus far presented regarding the four factors set out in § 107 are insufficient for the Court to decide as a matter of law whether Defendants' use is fair.

The Defendants would have the Court dismiss the four-factor fair use test mandated by Congress and adopted by the courts in favor of a three-part test. (Defendants' Brief at p. 17). No court has adopted Defendants' three-part analysis. Moreover, the proposed three-part analysis would be directly contrary to the mandatory language used in § 107. Court decisions interpreting § 107 have uniformly considered the four factors that Congress mandated for evaluation of fair use questions. For example, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561, 105 S. Ct. 2218, 2231, 85 L. Ed. 2d 588 (1985), the Supreme Court held that § 107 requires a case-by-case analysis and noted that the factors are non-exclusive. No case stands for the proposition that fewer than the four factors are to be considered. To the contrary, § 107 of the Copyright Act of 1576 explicitly states "In determining whether the use made of a work in any particular case is a fair use the factors to be considered *shall* include . . ." 17 U.S.C. § 106. The mandatory consideration of the four factors is self-evident. Accordingly, this case must be examined in light of at

least the four non-exclusive factors set out in § 107. *See Bourne Co. v. Speeks*, 670 F. Supp. 777, 780 (E.D. Tenn. 1987).

As demonstrated below, application of the four factors to the facts of this case as thus far developed makes it clear that a genuine issue exists as to material facts.

Defendants also assert that the Court should adopt an "economic model" of fair use analysis, citing a law review note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395 (1984). This model, according to Defendants, suggests that any use of social value should be considered fair, *if it does not substitute for exploitation of the original work.* In this case, the Defendants' work does substitute for Acuff-Rose's exploitation of the work. Exploitation is not limited to Roy Orbison's recording of the work, but includes licenses for derivative uses. (Teifer Declaration at ¶ 10). The note cited above recognizes this fact. "The 'economic' model of fair use posits that socially valuable use of an original should be limited only when the taking would result in significant commercial harm to the holder of the copyright." *Id.* at 1398. Thus, even if Defendants' "economic model" were the law, there is a genuine issue of material fact present in this case.

a. The Purpose and Character of the use

The first factor set out for consideration in § 107 is the purpose and character of the use, including whether the use is of a commercial nature. The fact that a publication is commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. "Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Harper &*

Row, 471 U.S. at 562, 105 S. Ct. at 2231 (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454, 104 S. Ct. 774, 793, 78 L. Ed. 2d 574 (1984). Where a use is for commercial purposes, this factor weighs in favor of the party claiming the infringement. "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.*, 464 U.S. at 562, 105 S. Ct. at 2231.

In this case, there can be no dispute that the Defendants' use of "Oh, Pretty Woman" was for a commercial purpose and, regardless of motive, the Defendants stood to profit from their unauthorized use of Acuff-Rose's copyrighted material. The work the Defendants created was included on a commercially distributed record album sold for the purpose of making a profit. Defendants in this case used the copyrighted material without paying any price whatsoever. This factor of the fair use analysis weighs in favor of the copyright holder, Acuff-Rose. This use was presumptively an unfair exploitation of Acuff-Rose's monopoly privilege to create a derivative work under § 106(2).

b. Nature of the Copyrighted Work

The second factor that Congress mandated for consideration is the nature of the copyrighted work. This factor weighs in favor of the copyright holder where the work is creative and expressive rather than merely factual. This fair use factor also favors Acuff-Rose.

In *MCA Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981), the court held that under this factor it was important to consider whether the work taken was creative, imaginative, and original and

whether it represented a substantial investment of time and labor made in anticipation of a financial return. similarly, in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986), the court held that the scope of fair use was greater when informational, as opposed to creative, works were involved. *See also Marcus v. Rowley*, 695 F.2d 1171, 1176 (9th Cir. 1983); 3 M. Nimmer, *Nimmer on Copyright* § 13.05[a][2].

Once again, there can be no dispute that the material copied by Defendants was creative and imaginative, not merely factual. Roy Orbison and William Dees both invested time and labor to create "Oh, Pretty Woman" in expectation of financial return. The nature of the copyrighted work factor of the fair use analysis weighs in favor of Acuff-Rose, the copyright holder.

Furthermore, musical works deserve special protection under this factor of the analysis. Musical works such as "Oh, Pretty Woman" are unique in that they involve two separate and distinct elements — music and lyrics — both of which are deserving of protection. *See* 1 M. Nimmer, *Nimmer on Copyright* § 2.05[B]; *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393 (S.D.N.Y. 1973). Both the music and the lyrics are creative elements deserving copyright protection, as opposed to the usual case involving only words. This distinction in the nature of the work weighs this factor even more heavily in favor of Acuff-Rose.

c. Amount and Substantiality of the Portion Used

The third factor in the fair use analysis is the amount and substantiality of the portion of the work used. Courts break this factor into a two-pronged analysis. The first of these two prongs is the quantitative analysis, i.e. how much is used; the second prong is the qualitative analysis, i.e. how important is the portion used.

i. Quantitative

This prong of the amount and substantially of the portion used factor examines how much of the original work was taken and how much of the new work it comprises. The statutory substantiality consideration should examine "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." *Harper & Row*, 471 U.S. at 564, 105 S. Ct. at 2233.

In *MCA, Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976), the court decided that the taking was substantial. The case involved a "parody" of the song "Boogie Woogie Bugle Boy of Company B." The "parody" was called "Cunnilingus Champion of Co. C." The district court in *Wilson* considered persuasive the following items of evidence relating to the amount of the work that was used: copying "Bugle Boy's" "eight to the bar rhythm," the similarity and alliteration of both songs' titles, and the "similarity in the movement of the musical [lines]." *Wilson*, 425 F. Supp. at 447-48. On the appeal of this case, the circuit court concluded, "Use of copyrighted material without the owner's consent generally will not be considered reasonable if it extensively copies or paraphrases the original . . . ." *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

In *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), heavily relied on by Defendants, the court found that the infringer had used only six of the song's 38 bars of music and that the use made up only 29 *seconds* of the 40 *minute* total of the record album. The Defendants in this case have used much more than that. (Spielman Declaration at ¶ ¶ 6-8). However, even use of a small amount of a work can be an unfair use. In *Harper & Row*, the infringers used only 300 words of a 200,000 word book and the words taken constituted only 13 percent of the infringing article. Nonetheless, the Supreme Court concluded that the use was not fair.

In this case, the Defendants have unquestionably used a substantial portion of Acuff-Rose's copyrighted work. *See* Spielman Declaration. The quantitative portion of the analysis is therefore unquestionably in favor of Acuff-Rose.

ii. Qualitative

This prong analyzing of the amount and substantiality of the portion used factor examines the quality, or importance, of the material that is lifted from the copyrighted work. This factor was key in the *Harper & Row* case. In that case the *Nation* magazine had excerpted portions of Gerald Ford's upcoming biography. Although the quotations used were only a small part of the total biography, the Supreme Court held that the defendant had taken the "heart" of the work. The Court concluded the particular portions taken were chosen "because they qualitatively embodied Ford's distinctive expression." *Harper & Row*, 471 U.S. at 565, 105 S. Ct. at 2233. Accordingly, the Supreme Court rejected the conclusion of the Second Circuit Court of Appeals that the defendant's taking was "meager," where the "expressive value of the excerpts and their key role in the infringing work" were qualitatively significant. *See Harper & Row*, 471 U.S. at 565-66, 105 S. Ct. at 2233. *See also Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir. 1987).

Further, a taking that is "insubstantial with respect to the *infringing* work" does not necessarily find shelter under fair use. *Harper & Row*, 471 U.S. at 565, 105 S. Ct. at 2233. Quoting Judge Learned Hand, the Supreme Court observed, " 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.' " *Id.* (citation omitted).

As discussed above, the portions taken from "Oh, Pretty

Woman" are qualitatively significant to the unique identity of the original. (Spielman Declaration at ¶ 7-9). In fact, those portions constitute the heart of "Oh, Pretty Woman." The Defendants took key passages from the copyrighted work that were chosen for their world-wide recognizable value, including the key words from its name. Defendants took the catchy and repetitive guitar refrain, of "Oh, Pretty Woman." Defendants used that same guitar refrain, as well as the opening drum beat, the opening lyric, the melody, and the chorus of "Oh, Pretty Woman" throughout their infringing derivative work in order to catch and sustain the listener's attention and to capitalize on the copyrighted composition. In so doing, Defendants took the "heart" of Acuff-Rose's copyrighted work.

The Defendants should not be allowed to prosper from repeatedly displaying the most ingenious portions of "Oh, Pretty Woman." Thus, this factor weighs decidedly in favor of Acuff-Rose. At the very least, a genuine issue exists as to this material fact. A comparison of the declaration submitted by Acuff-Rose's expert and the affidavit submitted by Defendants' expert shows that whether Defendants took too much of "Oh, Pretty Woman" is squarely at issue in this case. *Compare* Brand affidavit *with* Spielman Declaration at ¶¶ 7-9).

The Defendants admit in their brief that courts tend to find extensive takings unreasonable particularly when the contested use is parody because the parodist has derisively turned the original author's work against him. (Brief at 14). The Defendants then argue, citing only a law review article, that this is inconsistent with the goal of the Copyright Act. The Defendants ignore the fact that the goal of the Copyright Act is achieved by granting the copyright holder a monopoly in a particular work. *Harper & Row*, 471 U.S. at 546, 105 S. Ct. at 2223. To allow wholesale uses of the work under the guise of fair use would undercut the Copyright Act

by denying the Congressional grant of monopoly rights to copyright holders and thereby discourage individuals from making their works public. In *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988), the court pointed out "[b]ecause the copyright laws exist to stimulate artistic creativity for the benefit of the public, care must be taken to ensure the artist has sufficient financial motivation for creativity." *Id.* at 1527 (citing *Wilson*, 677 F.2d at 183). For this reason Congress mandated, and the courts have consistently held, that an examination of the amount of the copyrighted work used should be considered when fair use determinations are made.

Because the parties vigorously dispute whether the amount taken constitutes a fair use of Acuff-Rose's copyrighted property, a genuine issue of material fact exists. Because this issue cannot be decided as a matter of law, Defendants' motion should be denied.

d. Effect on Potential Market for or Value of the Work

The fourth factor to be considered in determining whether a particular infringement is a fair use is the effect the new work will have on the potential market for or value of the copyrighted work. This factor is regularly described by courts as the most important of the four. *Harper & Row*, 471 U.S. 566, 105 S. Ct. at 2233. " 'Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.' " *Id.* at 566-67, 105 S. Ct. at 2234 (quoting 1 M. Nimmer, *Nimmer on Copyright*, § 1.10[D] , at 1-87); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986). To negate a fair use defense, "one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.' This inquiry

must take account not only of harm to the original but also of harm to the market for *derivative* works." *Harper & Row,* 471 U.S. at 568, 105 S. Ct. at 2234 (quoting *Sony Corp.*, 464 U.S. 417, 104 S. Ct. 774, 793, 78 L. Ed. 2d 574) (emphasis added).

The Defendants argue that their work must "usurp" the market for Acuff-Rose's original work for this factor to weigh in favor of Acuff-Rose. This position is incorrect.[2] Defendants attempt to establish through the affidavit of a purported expert that their work will not interfere with sales of Acuff-Rose's work because the audiences for performances by Roy Orbison and The 2 Live Crew are different. Not only is this point in dispute, the argument misses the mark. A defendant may rebut an initial *presumption* of unfair exploitation by "convincing the court that the parody does not unfairly diminish the economic value of the original." *Fisher,* 749 F.2d at 437 (citing *Pillsbury Co. v. Milky Way Productions,* 215 U.S.P.Q. 124, 131 & n.9 (N.D. Ga. 1981) (emphasis added) (copy attached). This statement of the law is a far cry from a holding that the defendant is excused if its work does not usurp the market for the copyrighted work.

The owner of the copyright need prove only *some* meaningful likelihood of future harm to have this factor weigh in its favor. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986). "The owner need only show that, should the challenged use become widespread, it would adversely affect the potential market for the work." *Id.* citing *Sony Corp.*, 464 U.S. at

2. Obviously, Defendants' work and the copyrighted work are in competition in the pre-recorded music market. Through their use of the names of Roy Orbison, William Dees, and Acuff-Rose, the Defendants have represented to the potential purchaser that they are using the original copyrighted material. The label and album contain no indication that the work is a "parody."

451, 104 S. Ct. at 793 and *Harper & Row,* 105 S. Ct. at 2234-35. "The absence of measurable pecuniary damages does not require a finding of fair use." *Marcus v. Rowley,* 695 F.2d 1171, 1177 (9th Cir. 1983). As Professor Nimmer has pointed out, it is a mistake to view this factor as raising the question of damages to the plaintiff caused by the activities of the defendant. 3 M. Nimmer, *Nimmer on Copyright* § 13.05 [A]. "This factor rather poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant (whether in fact engaged in by the defendant or by others) would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work." *Id.*

The analysis focuses on the effect of the taking "upon the *potential* market for or value of the copyrighted work." *Fisher,* 749 F.2d at 437 (emphasis added); *MCA, Inc. v. Wilson,* 677 F.2d 180, 183 (2d Cir. 1981) (recognizing that it is the "expectation of gain" that must be considered). Thus, the decision turns on the potential market for the protected property.

The copyrighted work in this case is the music and lyrics of "Oh, Pretty Woman."[3] Not only does Acuff-Rose have the right to protect its existing work and market, but also Acuff-Rose has the right to protect the opportunity to sell the work in the future. *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987). The Defendants totally ignore these future opportunities. The *New Line* court pointed out that beyond the immediate market for a copyrighted work, derivative works of the plaintiff, "either already in existence or potential, that may be adversely affected by the

3. The Defendants err in concluding that the market for the copyrighted work is limited to the "Roy Orbison audience." (Teifer Declaration at ¶ 11). Because the copyrighted work in this case includes the music and lyrics of "Oh, Pretty Woman," Roy Orbison's recording of that song is not the only issue.

allegedly infringing work" should be considered by courts when evaluating the effect of a defendant's use. *New Line*, 693 F. Supp. at 1528 (citations omitted). *See also Harper & Row*, 471 U.S. at 568, 105 S. Ct. at 2234 (inquiry must account of harm not only to the original but also to the market for derivative works). "If the defendant's work adversely affects the value of any of the rights in the copyrighted work, the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." 3 M. Nimmer, *Nimmer on Copyright* § 13.05[B]. The Defendants in the instant case have created a derivative work that interferes with Acuff-Rose's future opportunities.

In the *Hustler* case, the court held that three factors should be considered in deciding whether the infringing use has harmed the market for or value of the copyrighted work. These considerations are whether the infringing work: (1) tends to diminish or prejudice the potential sale of the work; or (2) tends to interfere with the marketability of the work; or (3) fulfills the demand for the original work. *Hustler*, 796 F.2d at 1155-56 (numerous citations omitted). In this case, the Defendants would have this Court focus solely on the third of these three components, which is simply not the law. Obviously the parties dispute the damage that the Defendants' unauthorized taking has caused and will cause to the copyrighted work. *Compare* Brand affidavit *with* Teifer Declaration at ¶ ¶ 11 & 12.

At least one other element has been considered in evaluating the potential market factor. In *D.C. Comics, Inc. v. Unlimited Monkey Business*, 598 F. Supp. 110, 119 (N.D. Ga. 1984), the court held that an effect on the potential market could result from "bawdy associations" created by the infringer's adaptations by tarnishing the copyrighted work. In the past, Acuff-Rose has been very successful in licensing the rights on "Oh, Pretty Woman."

However, a shadow has been cast over those licensing opportunities because of infringement by Defendants, whose unsavory activities have received wide publicity. (Teifer Declaration at ¶ 12)

Furthermore, as pointed out above, satisfaction of the demand for the original work is only one consideration. The effect on the potential market factor weighs the *impairment* of the market, not its total domination. This, the most important of all the factors, weighs in favor of Acuff-Rose. At the very least, there is a genuine issue about which party this factor favors. The motion therefore should be denied.

In this case, the use of "Oh, Pretty Woman" has damaged Acuff-Rose's expectation of gain in a number of ways. First, Acuff-Rose has lost the opportunity to prepare a derivative work from "Oh, Pretty Woman" that would appeal to a rap music audience. By making their unauthorized derivative work, Defendants have taken this opportunity from Acuff-Rose. Second, Acuff-Rose has lost the opportunity to authorize a burlesque version of "Oh, Pretty Woman" because Defendants claim to have created that work. Third, "Oh, Pretty Woman" has been tarnished by being associated with these lyrics and with The 2 Live Crew. Fourth, and most importantly, Acuff-Rose has lost the opportunity of future licensing arrangements because "Oh, Pretty Woman" will now be associated with Defendants and with their lyrics. (Teifer Declaration at ¶ 12).

Contrary to Defendants' simplistic position, they cannot demand that Acuff-Rose prove[4] actual harm to this property by the infringing use. When reasonable minds cannot disagree that the

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4. Defendants have the burden to prove the defense of fair use.

infringement diminishes the copyrighted work by dirtying it, potential harm to the owner's market is clear. There is no clear way to tell in which markets the copyrighted work might have become valuable, but that is not Acuff-Rose's burden. It is not proof of actual harm that is required, but proof of harm that would occur if the infringing use became widespread. *Sony Corp.*, 464 U.S. at 451, 104 S. Ct. at 793; *Harper & Row*, 471 U.S. at 568, 105 S. Ct. at 2234-35. The Defendants' affidavits state that the two works at issue here do not compete, but these very conclusory statements do not mean a material fact is not at issue. In the face of such an issue, the Court should deny the Defendants' motion.

The Defendants cite both *Walt Disney Productions v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975), and *MCA Inc. v. Wilson*, 425 F. Supp. 443 (S.D.N.Y. 1976). Defendants acknowledge that in those cases the copyright holders sued successfully, not just so their works could be sold elsewhere but to prevent uses that were thought to degrade the ideals presented by the materials. (Defendants' Brief at 28). This is exactly the point here. One of the reasons Acuff-Rose has brought suit is to prevent the besmirching of its copyrighted work. Defendants' argument that only usurpation of a particular market is a proper reason for denying fair use protection is without merit. Obviously, safeguarding the value of the work is also a valid reason for denying fair use protection.

The Defendants also cite *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 USPQ 124 (N.D. Ga. 1981) for the proposition that what could be considered offensive to one person might not be offensive to another. Defendants' reliance on *Pillsbury*, in addition to being a concession that their infringing use of Acuff-Rose's "Oh, Pretty Woman" is offensive, is misplaced. That case is distinguishable on two different grounds. First, the

instant case is about protecting a copyrighted work — "Oh, Pretty Woman." Whether that work has been disparaged is only a small element of the overall case going to Defendants' ultimate burden to prove fair use. Just because some people might prefer or approve of Defendants' unauthorized derivative work does not mean that the use they have made is fair. Second, the court pointed out in the *Pillsbury* case that the infringement was located on the inside of a magazine, not on the cover where it might be interpreted as an attempt to capitalize on the copyrighted work. Here, the Defendants have capitalized on the copyrighted work by including the name "Pretty Woman" and the names of William Dees, Roy Orbison, and Acuff-Rose on the cover and label copy of their work. There can be no doubt that this attribution is an attempt to capitalize on a work that enjoys world-wide recognition and acclaim.

e. Other Factors to be Considered

In addition to the four factors set out in § 107, Congress recognized that other factors could be examined in determining whether a particular use was fair. Section 107 "requires a case-by-case determination whether a particular use is fair, and the statute notes four *nonexclusive* factors to be considered." 17 U.S.C. § 107; *Harper & Row*, 471 U.S. at 549, 560, 105 S. Ct. at 2225, 2230 (emphasis added).

An additional factor that courts have discussed and considered is the bad faith of the infringer. *See Harper & Row*, 471 U.S. at 562, 105 S. Ct. at 2232 (quoting 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-72. Courts have contemplated evidence of bad faith as a nonstatutory consideration when weighing an infringer's claim of fair use of a copyrighted property. "Fair use presupposes 'good faith' and 'fair dealing.' " *Harper*,

471 U.S. at 562, 105 S. Ct. at 2232 (quoting *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)). *See also Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990) (court suggests factor militating against fair use is whether paraphrasing and copying were done in good faith or with an evasive motive); *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (court considered factor but rejected copyright holder's bad faith claim).

In this case, the Defendants sought permission to create a derivative work based on "Oh, Pretty Woman." However, this permission was not sought until the derivative work was already completed and within less than a month before the album went on sale. Furthermore, until well after this lawsuit was commenced, the Defendants made no attempt to pay any mechanical or other royalty to Acuff-Rose, even though they obviously knew that Acuff-Rose owned the copyright and was due a mechanical royalty.[5] Therefore, a genuine issue of material fact exists regarding this additional, nonstatutory consideration. The motion should be denied.

C. Counts II and III of the Complaint are not Preempted by the Copyright Act.

The Defendants contend that Counts II and III of the Complaint should be dismissed because they are preempted by the Copyright Act. These state law claims are not preempted by the Copyright Act. First, 17 U.S.C. § 301(b)(3) clearly exempts certain state causes of action from the preemption provisions of the Act.

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5. The Defendants subsequently moved to pay money into the Court for royalties.

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —
>
> > (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by § 106.

The rights protected by the Tennessee common law and state statutes are not preempted where those laws are not equivalent to any of the exclusive rights provided by § 106. Counts II and III of the complaint are not equivalent to any rights provided by § 106.

The Defendants also contend that Acuff-Rose has not pleaded how the infringing derivative work will interfere with its rights. Under the rules of notice pleading, there is no requirement that Acuff-Rose plead in such a manner. Fed. R. Civ. P. 8(a)(2); *State of Tennessee ex rel. Davis v. Hartman*, 306 F. Supp. 610 (E.D. Tenn. 1969). However, any questions about this should be answered by the attached declaration of Gerald Teifer. Further, Acuff-Rose expects to discover further evidence in support of its claims during the discovery process. Acuff-Rose filed discovery along with its complaint. No objection has been filed to this discovery and no response has yet been made by the Defendants.

IV. CONCLUSION

Based on the foregoing, Acuff-Rose submits that, taking all the facts in the light most favorable to it, this case presents a genuine issue of material fact. Accordingly, Acuff-Rose requests that the Court deny the Motion to Dismiss filed by the Defendants.

Appendix K

Respectfully submitted,

KING & BALLOW
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Appendix K

CERTIFICATE OF SERVICE

I hereby certify that on August 28th, 1990 a true and exact copy of the foregoing was served on Defendants by placing a copy of same in the U.S. Mail, postage prepaid thereon, addressed to:

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

Sanford R. Ross, Esq.
1319 16th Avenue South
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Nashville, TN 37203

APPENDIX L — DECLARATION OF EARL V. SPIELMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a/ Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DECLARATION OF EARL V. SPIELMAN

Pursuant to 28 U.S.C. § 1746, I, Earl V. Spielman, declare under penalty of perjury, and under the Laws of the United States of America, and of my own knowledge:

1. I am a musicologist with a Ph.D. degree in musicology from the University of Wisconsin-Madison.

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2. I have served on the faculty of the University of Hawaii and the University of Tennessee-Nashville. I have delivered lectures at the Vanderbilt University Law School, the Vanderbilt University Music Department, and at the Southern Illinois Music Department. I have published numerous articles in the area of musical performance style and stylistic analysis. I have worked full-time for 15 years in the commercial music industry. I have been qualified as an expert to testify in trials and other judicial proceedings.

3. I have also worked in the recording industry as an arranger, contractor, record producer, studio musician, songwriter, and publisher.

4. I have examined and compared the musical work "Pretty Woman" as recorded by The 2 Live Crew, with "Oh, Pretty Woman."

5. As a result of this comparison, I have concluded that the works are substantially similar.

6. The factors that are most important in determining substantial similarity from a musicological point of view are the succession of actual pitches within a given rhythmic framework, and the harmonic progressions used in a composition. Other parameters, such as the key, meter and tempo of a performance, the formal structure and the way in which sections and phrases are organized, and similarity of melodic-rhythm contribute to the body of evidence of similarity.

7. After extensive analysis, I have been able to discern a significant amount of similarity between the two works listed above, These include:

a. the one measure guitar lick, which is repeated over and over again in the intro and subsequent transition sections (and which may have actually been sampled or lifted and then incorporated into the recording of "Pretty Woman" as performed by The 2 Live Crew);

b. the duplication of the opening line of text of "Oh, Pretty Woman" and the use of the words of the title an additional six times in the course of the remainder of "Pretty Woman";

c. The melodic line of the verse sections of the respective songs;

d. the melodic line of the bridge sections of the respective songs;

e. aspects of the formal structures; the opening measure of percussion; the lyrical structures of the respective texts; and the fact that both works are performed in the same key and at approximately the same tempo.

8. Apart from the detailed analysis of each isolated musical parameter, if someone were to just listen to the sound sources of the two works at issue, no matter what the extent of their musical knowledge or degree of sophistication, one would immediately recognize that "Pretty Woman" was modeled after "Oh, Pretty Woman."

9. Consequently, barring any additional evidence to the contrary, and resulting strictly from analysis of the musical works at issue, from a musicological perspective I find that there is a remarkable degree of similarity between the two works, in terms of both textual and musical materials, similarities which cannot be

explained to have come about as a result of coincidence or totally independent creation.

Further Declarant saith not.

August 28, 1990
Date

s/ Earl V. Spielman
EARL V. SPIELMAN

APPENDIX M — DECLARATION OF GERALD E. TEIFER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a/ Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DECLARATION OF GERALD E. TEIFER

Pursuant to 28 U.S.C. § 1746, I, Gerald E. Teifer, declare under penalty of perjury, and under the Laws of the United States of America, and of my own knowledge:

1. I am Director of Licensing for Acuff-Rose Music, Inc., and

have been employed by Opryland USA since the Fall of 1985. I have been involved in the music industry for over 35 years.

2. In my capacity as Director of Licensing, I review requests for permission to use copyrighted materials that Acuff-Rose owns.

3. Acuff-Rose owns the copyright in "Oh, Pretty Woman" written by Roy Orbison and William Dees.

4. I have seen a copy of a letter from Linda Fine to me requesting a license for The 2 Live Crew to create a derivative version of the work "Oh, Pretty Woman."

5. I do not remember reading the lyrics for this work. I never heard a cassette tape of this work prior to July 17, 1989.

6. I have seen a copy of a letter dated July 17, 1989, which I signed, denying the license referred to above.

7. In that letter I use the term "parody."

8. I use the word parody to describe any derivative work; i.e., any work in which the melody of an existing work is coupled with new lyrics. Based on my experience in the music industry, I consider this a common custom and usage surrounding the term.

9. Over the years since Acuff-Rose registered the copyright in "Oh, Pretty Worman," it has carefully guarded its copyright in "Oh, Pretty Woman," and has prevented uses that would have disparaged or tainted the work.

10. "Oh, Pretty Woman" was a hit following its release. It is now a standard and generates significant foreign and domestic

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revenue. Acuff-Rose receives frequent licensing requests for individuals to use "Oh, Pretty Woman." These requests range from uses of the song in a current hit movie and other productions to advertising and marketing campaigns.

11. The market for the rights to "Oh, Pretty Woman" extends beyond the audience for Roy Orbison's performance of that work.

12. If The 2 Live Crew's derivative work should become widespread, it would further impair the value of the copyrighted work, and future opportunities for licensing it.

Further Declarant saith not.

August 28, 1990
Date

s/ Gerald E. Teifer
GERALD E. TEIFER

APPENDIX N — DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a/ Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Appendix N

I

PREFACE

Comes now the Defendants, who file this Supplemental Memorandum in response to the Plaintiff's responsive pleading to the Defendants' Motion to Dismiss. The Defendants reiterate their request for oral argument to afford the Court an opportunity to listen to the Plaintiff's original work and compare same to the parody performed by the Defendants. The Defendants respectfully assert that the determination as to whether or not this parody constitutes fair use under 17 U.S.C. Section 107 of the Copyright Act vest exclusively with the Court.

II

WHETHER THE DEFENDANTS' PARODY IS FAIR USE IS A JUDICIAL DETERMINATION

17 U.S.C. Section 107 provides in part:

> . . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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> (4) the effect of the use upon the potential market for or value of the copyrighted work.

In *Harper and Row Publishers v. Nation Enterprises,* 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), the United States Supreme Court specifically stated that "fair use is a mixed question of law and fact" and that "where the District Court has found facts sufficient to evaluate each of the statutory factors" an appellant court may conclude as a matter of law without remanding for further fact finding" the issue of whether or not a challenged use qualifies as fair use of the copyrighted work. In *Fisher v. Dees,* 794 F.2d 432, 436 (9th Cir. 1986), the Ninth Circuit held that "no material historical facts are at issue in this case. The parties dispute only the ultimate conclusions to be drawn from the admitted facts. Because, under *Harper and Row,* these judgments are legal in nature, we can make them without usurping the function of the jury."

The Plaintiff argues that "Defendants' motion in this action must fail because genuine issues of material fact exist as to whether the use made by Defendants was a parody and whether that use was a fair use as the term in used in Section 107 of the Copyright Act." (Plaintiff's Memorandum of Law, p.4) The Plaintiff argues "A genuine issue of material fact exists as to whether the derivative work prepared by Defendants is a parody." (Plaintiff's Memorandum of Law, p. 6) The Plaintiff also argues "whether the infringing work makes any statement at all about the original work is an open factual question for the court to decide." (Plaintiff's Memorandum of Law, pp. 7, 8) The Plaintiff argues "A genuine issue of material fact exists with regard to whether the Defendants have made too extensive a use of the copyrighted work." (Plaintiff's Memorandum of Law, p. 14) Lastly, the Plaintiff argues

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that "The Defendants' work does substitute for Acuff-Rose exploitation of work. Exploitation is not limited to Roy Orbison's recording of the work, but includes licenses for derivative works." (Plaintiff's Memorandum of Law, p. 18)

The Defendants submit that each of these alleged disputed issues of material fact are mixed questions of law and fact to be determined by the Court. The Defendants respectfully assert that the Court can determine each of these issues by simply listening to the original work and comparing same to the parody.

III

THE PLAINTIFF DOES NOT HAVE A MORAL RIGHT IN ITS COPYRIGHTED WORK

Certain European and other countries have long recognized rights which are personal to authors, and as such viable separate and apart from the proprietary aspect of copyright. These right are known as droit moral, or moral rights. They may be generally summarized as including the following author's rights: to be known as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from the distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing. See generally Strauss, "The Moral Right of the Author," 2 *Studies on Copyright* 963 (Fisher ed. 1963); Sarraute, "Current Theory on the Moral Right of Authors and Artists Under French Law," 16 Am.J.Comp. Law 487 (1968); Merryman, "The Refrigerator of Bernard Buffet," 27 Hasting L.J. 1023 (1976).

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In 1988, the United States sought to become a member of the Berne Conference (hereinafter referred to as "BCIA"), an international treaty concerning copyright protection. In Congress, the bill which adopted the BCIA refused to acknowledge the European concept of moral right. As stated in *Nimmer,* The Law of Copyright Section 8.2[a], page 8-250:

> During the debate over BCIA, Congress faced an avalanche of opposition to moral rights, including denunciations of moral rights by some of the bill's most vociferous advocates. If the BCIA had any hope of passage, the task was presented of fashioning a method for the United States to join the Berne Union without incorporating Berne-style moral rights provisions into the fabric of American law. The law as passed purports to satisfy that goal.

As part of the legislative history of the BCIA, the House "Committee stat[ed] unequivocally that Berne is not self-executing, that domestic law is not in any way altered except through the implementing legislation itself, and that the implementing legislation is absolutely neutral on the issue of the rights of paternity and integrity." The BCIA itself states that the adherence of the United States to the Berne Convention and passage of the BCIA "do not expand or reduce any right of an author" to assert the right of attribution and integrity in any copyrightable work. Congress, in short, intended to be completely noncommittal on how moral rights should develop in the future.

Clearly, American Jurisprudence and the Copyright Act of 1976 has not recognized an artist's moral right in his work. *Gilliam v. American Broadcasting Cos.*, 538 F.2d (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, right of authors."); *Varqas v. Esquire, Inc.*, 164 F.2d 522 (7th Cir. 1947); *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup.Ct. 1949). See *Granz v. Harris*, 198 F.2d 585, 589 (2d Cir. 1952) (concurring opinion per Frank, J.) for a discussion of the rejection by American court of the term "moral rights." See *Stevens v. National Broadcasting Co.*, 148 U.S.P.Q. 755 (Cal. Super.Ct. 1966); *Geisel v. Poynter Prods., Inc.*, 295 F.Supp. 331 (S.D.N.Y. 1968) ("[T]he doctrine of moral right is not part of the law in the United States . . . except insofar as parts of that doctrine exist in our law as specific rights — such as copyright, libel, privacy and unfair competition.") *Cf. Shostakovich v. Twentieth Century-Fox File Corp.*, 196 Misc. 67, 80 N.Y.S.2d 575 (1948), aff'd, 275 App.Div. 692, 87 N.Y.S.2d 430 (1949); *Edison v. Viva Intern., Ltd.*, 70 App.Div.2d 379, 421 N.Y.S.2d 203 (1979) ("a right analogous to 'moral right', though not referred to as such, has been recognized in this country . . ."). American Jurisprudence does recognize an artist's contractual rights to maintain the integrity of his work. However, the parties in the base at bar had no contractual relationship.

The Plaintiff argues that "Although receiving frequent licensing request for 'Oh, Pretty Woman,' Acuff-Rose has zealously protected the copyright and has only allowed licenses that were consistent with good taste and that furthered the value of the property. License requests are granted pursuant to Acuff-Rose's long range plans for appropriate exploitation of 'Oh, Pretty Woman.' Typically, denied requests are not consistent with these

long range plan and/or good taste or retain a risk of disparaging the future value of 'Oh, Pretty Woman.' The song 'Oh, Pretty Woman' has been frequently recorded and widely disseminated." (Plaintiff's Memorandum of Law, p. 2) The Plaintiff further argues that "In the past, Acuff-Rose has been very successful in licensing the rights to 'Oh, Pretty Woman.' However, a shadow has been cast over those licensing opportunities because of infringement by Defendants, whose unsavory activities have received wide publicity. (Teifer Declaration at paragraph 12)." (Plaintiff's Memorandum of Law, p. 29) Lastly, the Defendants represent to the Court that the Plaintiff's copyright work "has become a standard that continues to generate substantial revenue, including its current use in a successful motion picture under a license. (Teifer Declaration at paragraph 10)." (Plaintiff's Memorandum of Law, p. 12) The Plaintiff fails to cite any case law in support of its argument that it has a right to discriminate as to what artists may perform its copyrighted work and as to what artists may prepare a derivative parody of its copyrighted work. Under American Jurisprudence no moral right is granted a copyright owner under the 1976 Copyright Act.

The Plaintiff alleges that it has "only allowed licenses that were consistent with good taste and that furthered the value of the property." (Plaintiff's Memorandum of Law, p. 2) The successful motion picture entitled "Pretty Woman" referenced by the Plaintiff is about a common street prostitute. In the movie, the Plaintiff's copyrighted work is associated with the character played by Julia Roberts, who plays a whore. In 1972, the rock group Van Halen, who are widely known for their sexually suggestive performances, did a musical video of the Plaintiff's copyrighted work, "Oh, Pretty Woman." The Plaintiff's allegation that "a shadow has been cast over these licensing opportunities because of the infringement by Defendants, whose unsavory activities have received wide publicity" and its allegation that "Acuff-Rose has lost the

opportunity of future licensing arrangements because of 'Oh, Pretty Woman' will now be associated with Defendants and with their lyrics (Teifer Declaration at paragraph 12)", constitutes nothing more than prejudice discrimination.

The Plaintiff further alleges that the Defendants' parody "diminishes the copyrighted work by dirtying it." This argument is ridiculous. The Court has been furnished with a copy of the lyrics of the Defendants' parody. The Defendants submit that there is nothing dirty or unsavory about these lyrics. The Plaintiff does not, according to the applicable law, despite its allegations, have a right to determine that the Defendants are unsavory and inconsistent with its opinion as to "good taste."

IV

THE PLAINTIFF HAS ADMITTED THAT DEFENDANTS' WORK IS A PARODY

The Plaintiff argues that the letter from its agent, Gerald Teifer, dated July 17, 1989, to Linda Fine, agent of the Defendants, did not constitute an admission that the Defendants' work is a parody. (Plaintiff's Memorandum of Law, pp. 6, 7) (See Declaration of Gerald E. Teifer, paragraphs 4-8) The Plaintiff, through its agent, Teifer, attempt to deny this admission. The Plaintiff and its agent, Teifer, ignore that Linda Fine, the Defendants' agent, previously sent to Teifer a copy of the lyrics and a cassette of the Defendants' parody prior to Teifer's admission. (Exhibit A)

V

THE DEFENDANTS CANNOT BE PREJUDICED BECAUSE THEY SOUGHT PERMISSION FROM THE PLAINTIFF TO PREPARE THEIR PARODY

The Plaintiff criticizes the Defendants for seeking permission to prepare the derivative parody work. (Plaintiff's Memorandum of Law, p. 32) However, in *Fisher v. Dees*, the Court noted that:

> . . . Fisher and Seigel fault Dees for using the song after Fisher expressly refused him permission to do so. In their view, this shows bad faith on Dees's part. We cannot agree. Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee. See Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1397 n. 12 (1984). The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought. See 3 *M. Nimmer, supra*, Section 13.05[C], at 13-89; Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum.L.Rev. 1600, 1633 & n. 177. Moreover, to consider Dees blameworthy because he asked permission would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them.

Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986)

Appendix N

VI

THE DEFENDANTS DID NOT MISREPRESENT THEIR PARODY AS THE ORIGINAL WORK

The Plaintiff alleges that because reference was made to the original authors "Roy Orbison and William Dees" and to the Plaintiff's copyright interest that "The Defendants have represented to a potential purchaser that they are using the original copyrighted work." (Plaintiff's Memorandum of Law, p.14) This argument is ridiculous. The Defendants submit that a reasonable person would not conclude that the Defendants' parody version was in fact the copyrighted work.

Finally, the Plaintiff alleges that the Defendants' parody competes with the Plaintiff because it precludes the Plaintiff from preparing a rap musical parody version of the original work. (See Plaintiff's Memorandum of Law, p. 29) This argument is ridiculous. The Defendants' submit that if the Court were to accept such argument then no parodist could prepare a derivative work and the Court would be precluded from finding any parody fair use under Section 17, U.S.C. 107 of the Copyright Act.

VII

CONCLUSION

The Defendants have deposited into Court $13,867.56, which constitutes all of the monies owed to the Plaintiff based upon the Defendants' sale of *As Clean As They Wanna Be*, in accordance with the 1976 Copyright Act. The Defendants respectfully assert that these funds are all that the Plaintiff is entitled to.

Appendix N

The Defendants respectfully request this Honorable Court to grant their Motion to Dismiss and to tax costs against the Plaintiff. Finally, the Defendants reiterate their request for oral argument on their Motion to Dismiss.

Respectfully submitted,

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 4 day of October, 1990.

s/ Alan Mark Turk
ALAN MARK TURK

APPENDIX O — MOTION TO COMPEL PRODUCTION OF DOCUMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, Plaintiff Acuff-Rose Music, Inc. moves this Court for entry of an Order requiring Defendants, LUTHER R. CAMPBELL CHRISTOPHER WONGWON, MARK ROSS, DAVID HOBBS, THE 2 LIVE CREW, and LUKE SKYYWALKER RECORDS, to immediately produce all

documents requested in Plaintiff's First Request for Production of Documents.

Plaintiff would show the Court that:

1. Plaintiff served its First Request for Production of Documents with the Summons and Complaint in the above-styled lawsuit. Owing to difficulty in effecting service, the six defendants were served at different times; however, no later than July 12, 1990, all Defendants were properly served with Plaintiffs' First Request for Production of Documents.

2. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, all Defendants' responses were due no later than August 27, 1990.

3. After receiving no response to the document requests by August 31, 1990, Plaintiff sent a letter to Defendants' counsel calling to his attention the fact that Defendants' responses were out of time and requesting delivery of all of the requested documents no later than September 14, 1990.

4. On September 14, 1990, Plaintiff received a response from Defendants. Defendants produced 14 pages, representing documents responsive to nine of the 85 requests for productions, interposed 26 objections, and responded "none" to 33 requests.

5. On September 25, 1990, Plaintiff wrote to Defendants' counsel specifically setting forth the insufficiencies of the responses and offering to cooperate in setting a time for Defendants to complete their responses.

6. On October 19, 1990, Defendants' counsel by letter stated

that Defendants "at this time, do not intend to supplement their document production" and suggested Plaintiff file a Motion to Compel production.

7. On October 29, 1990, Defendants produced 31 additional pages of documents, and on November 19, 1990, an additional 23 pages. Nothing further has been received or promised.

8. Pursuant to Rule 9(e)(1)(a-c) & (2) of the Local Rules of Court for the United States District Court for the Middle District of Tennessee, Plaintiff has attached as Exhibit I to this Motion the verbatim requests for production that Plaintiff seeks to compel, along with Defendants' responses and Plaintiff's reasons supporting its motion to compel.

9. Pursuant to Rule 9(e)(3) of the Local Rules of Court for the United States District Court for the Middle District of Tennessee, Plaintiff has attached as Exhibit II to this Motion a statement that Plaintiff's counsel has conferred with Defendants' counsel in a good faith effort to resolve by agreement the issues raised and that counsel have not been able to do so.

10. In support of this Motion to Compel, Plaintiff has filed the accompanying Memorandum of Law in Support of Plaintiff's Motion to Compel Production of Documents.

11. Plaintiff moves this Court, pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure, to award the reasonable expenses, including attorneys' fees, incurred by Plaintiff in the preparation and filing of this Motion.

WHEREFORE, Plaintiff requests that Plaintiff's Motion to

Compel Production of Documents be granted and that this Court award such further relief as it deems proper and just.

Respectfully submitted,

KING & BALLOW

s/ Elizabeth B. Marney
E. Andrew Norwood
Elizabeth B. Marney
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219

Of Counsel:

Hal Willis
ACUFF-ROSE MUSIC, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Compel Production of Documents was duly served this 14 day of December, 1990, by U.S. Mail, postage prepaid, addressed as follows:

Alan M. Turk, Esq.
3310 West End Avenue
Nashville, Tennessee 37203

s/ Elizabeth B. Marney
Elizabeth B. Marney

Appendix O

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS, DEFENDANTS' RESPONSES, AND REASONS SUPPORTING MOTION TO COMPEL

III. SCHEDULE OF DOCUMENTS

1. Each document that relates to "Pretty Woman."

ANSWER: The Plaintiff's request is overly broad in accordance with Rule 26 of the Federal Rules of Civil Procedure as defined in

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definition K of the Plaintiff's First Set of Request for Production of Documents. The Defendants have produced all relevant documents concerning "Pretty Women." The Defendants further object to the production of other documents which "relate" to the song "Pretty Women" because said documents are protected under the attorney work product privilege and the attorney-client privilege.

REASON SUPPORTING MOTION: Defendants' objection and claim of privilege have been waived and are inapplicable. *See* Memo at 9-10.[1]

2. Each document that relates to "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 1217.

6. A copy of your source material for your recording of "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with their claim that "Pretty Woman" is a parody of "Oh, Pretty Woman." *See* Memo at 14.

7. A copy of each musical score, musical arrangement, printed

1. This and following references are to the Memorandum of Law in Support of Motion to Compel, filed and served herewith.

sheet music, lead sheet, orchestration, lyric sheet, and recording in any form relating to "Pretty Woman."

ANSWER: No documents exist today. Any documents which may have been utilized in the studio no longer exist.

REASON SUPPORTING MOTION: Defendants' response is incomplete. *See* Memo at 15.

8. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet and recording in any form relating to "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with their claim that "Pretty Woman" is a parody of "Oh, Pretty Woman." *See* Memo at 14.

9. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Pretty Woman" was discussed.

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with admission that counsel reviewed and advised Defendants to release "Pretty Woman." *See* Memo at 14-17.

10. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Oh, Pretty Woman" was discussed.

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with admission that counsel reviewed and advised Defendants to release "Pretty Woman." *See* Memo at 14-17.

12. Each document prepared by, for, or at your request or the request of any Defendant or Defendants relating to "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 1417.

13. Each document that relates to promotional material prepared for the album by The 2 Live Crew titled *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with industry practice. *See* Memo at 14-17.

14. Each document that relates to the facts and circumstances surrounding the decision to include "Pretty Woman" on the album *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 14-17.

15. Each document that discusses your use of "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with fair use defense. *See* Memo at 14-17.

16. Documents sufficient to show separately each of the following:

a. the total amount of income you received from the recording of "Pretty Woman";

ANSWER: None.

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents and with practices of the industry. *See* Memo at 14-17.

b. the total amount you paid to produce "Pretty Woman";

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and with practices of the industry. *See* Memo at 14-17.

c. the name, business affiliation, address, telephone number, service performed or product provided, and the amount of the payment for each person or entity that received payment for services or products related to the recording of "Pretty Woman."

ANSWER: None. All of the participants associated with the recording of "Pretty Woman" were employees of the corporate defendant. The studio where "Pretty Woman" was recorded is owned by the corporate Defendant.

REASON SUPPORTING MOTION: Defendants' response is incomplete. *See* Memo at 16-18.

17. Each document that relates to each attempt to create lyrics for "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with the parody defense. *See* Memo at 13-17.

20. Each document that relates to the ownership of the copyright for "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with Defendants' other responses and/or produced documents. *See* Memo at 13-17.

21. Each document that relates to the ownership of the copyright for "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with Defendants' other responses and/or produced documents. *See* Memo at 14-18.

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28. Each document that relates to each request you made for a license for each song on the album *As Clean As They Wanna Be* from any person.

ANSWER: OBJECTION. The Defendants [sic] request for any license for any song on the album *As Clean As They Wanna Be* is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 6-8, 13, 19.

29. Documents sufficient to show the date of the creation of "Pretty Woman."

ANSWER: Defendants will produce the requested documents.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with Defendant Campbell's affidavit. *See* Memo at 17-19.

32. Documents sufficient to show the date(s) that the album *As Clean As They Wanna Be* was recorded.

ANSWER: OBJECTION. The Defendants have produced documents which evidences when the song "Pretty Woman" was recorded, March 6, 1989. The songs contained on the album *As Clean As They Wanna Be* were recorded on different dates during a several month period. The Defendants object to the production of these documents as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

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REASON SUPPORTING MOTION: Objection has been waived. *See* Memo at 7.

34. Documents sufficient to identify by name, business affiliation, address, and telephone number each person involved in writing, recording, producing, manufacturing, or developing "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents and with practices of the industry. *See* Memo at 13-17.

35. Each document used as a source in creating "Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with their claim that "Pretty Woman" is a parody. *See* Memo at 14.

37. Each document that relates to the review of "Pretty Woman" by a musicologist, attorney, or any advisor.

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived and is inapplicable. *See* Memo at 9-11.

38. Each document that relates to or contains a comparison of the music or lyrics of "Pretty Woman" with the music or lyrics of "Oh, Pretty Woman."

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ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived and is inapplicable. *See* Memo at 9-12.

39. Documents sufficient to identify Pac Jam Publishing (BMI).

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Defendants' objection has been waived and is inapplicable. *See* Memo at 7.

40. Documents sufficient to identify the Ghetto Style DJ's.

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Defendants' objection has been waived and is inapplicable. *See* Memo at 7.

41. Each document related to all royalties received by you from the sale of *As Clean As They Wanna Be*.

ANSWER: None.

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REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents and with practices of the industry. *See* Memo at 14.

42. Documents sufficient to show the total income received by you, Luke Skyywalker Records, Luke, Inc., or any other entity from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

43. Documents sufficient to show the total income received by you from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6-17.

44. Documents sufficient to show the total income received by Christopher Wongwon from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

45. Documents sufficient to show the total income received by Mark Ross from the album *As Clean As They Wanna Be*.

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ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

46. Documents sufficient to show the total income received by David Hobbs from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6, 17.

47. Documents sufficient to show the total income received by each person other than the members of The 2 Live Crew from the album *As Clean As They Wanna Be*.

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible. The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. In addition, Defendants' claim of burdensomeness is inconsistent with documents already produced, as well as industry practice. *See* Memo at 7.

48. Documents sufficient to show:

a. the date and destination of each shipment of *As Clean As They Wanna Be;*

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ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible. The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Defendants' objection has been waived and is inapplicable. In addition, Defendants' claim of burdensomeness is inconsistent with documents already produced, as well as industry practice. *See* Memo at 7.

b. the price paid to you for each copy of *As Clean As They Wanna Be;*

ANSWER: See the Record Activity Report which is produced.

REASON SUPPORTING MOTION: Defendants' response is incomplete. *See* Memo at 6.

c. the total number of copies thus far manufactured of *As Clean As They Wanna Be;*

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: To date no documents fully responsive to this request have been produced. *See* Memo at 6.

d. the total number of copies of *As Clean As They Wanna Be* that have been sold, both at the wholesale and retail levels;

ANSWER: The Defendants will produce the requested documents as to the total number of copies of *As Clean As They Wanna Be* at the retail level.

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REASON SUPPORTING MOTION: Defendants' response is incomplete and inconsistent with industry practice. *See* Memo at 6.

e. the total dollar amount of income generated by the sale of *As Clean As They Wanna Be;*

ANSWER: The Defendants will produce documents sufficient to show the gross sales of *As Clean As They Wanna Be.*

REASON SUPPORTING MOTION: Defendants' response is incomplete and/or unresponsive. *See* Memo at 6, 17.

49. Copies of all contracts with wholesalers, retailers, distributors and any other sellers or dealers of *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with industry practice. *See* Memo at 12-17.

50. Each document that relates to reports sent to or prepared for you regarding the sales of *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants' response is inconsistent with other responses and/or produced documents. *See* Memo at 13-14.

51. Documents sufficient to show the total number of copies of *As Clean As They Wanna Be* distributed for promotional purposes.

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ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with industry practice. *See* Memo at 13.

52. Documents sufficient to show the retail selling price and the wholesale price of *As Clean As They Wanna Be.*

ANSWER: None.

REASON SUPPORTING MOTION: Defendants response is inconsistent with industry practice. *See* Memo at 12-17.

56. Contracts, agreements, memoranda, letters and other documents sufficient to show each planned or actual concert or other personal appearance by The 2 Live Crew in Tennessee.

ANSWER: OBJECTION. The Defendant never performed the song "Pretty Woman" in the State of Tennessee. The Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and response is incomplete and/or unresponsive. *See* Memo at 7, 15.

57. Contracts, agreements, memoranda, letters and other documents sufficient to show each shipment of musical recordings and other materials by you into Tennessee, including, but not limited to, items such as jackets, T-shirts, posters, caps, and buttons.

Appendix O

ANSWER: OBJECTION. The Defendants do not maintain shipment records on a state by state basis. The Defendants have not utilized the words "Pretty Woman" on any jacket, T-shirt, poster, cap, and/or button. Therefore, the Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and response is incomplete and/or unresponsive. *See* Memo at 7, 15-16.

59. A copy of the certificate of incorporation for each corporation in which you hold more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 5-8.

60. A copy of any articles of association or partnership to which you are a party or on which your name appears.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 5-8.

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61. A copy of each annual report of Luke Skyywalker Records and Luke, Inc. since 1987.

ANSWER: None.

REASON SUPPORTING MOTION: Response is anomalous because contrary to law. *See* Memo at 15.

65. A copy of your tax returns since January 1, 1989, including all attachments.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

66. A copy of all tax returns and attachments for any organization in which you or Luke, Inc. owns more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

70. Documents sufficient to show the accounts you or Luke, Inc., or any organization in which you held more than a five percent interest, maintained since July 15, 1989, in any bank, savings institution, mutual account, fund, or trust.

Appendix O

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

71. A copy of each deposit receipt you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and applicable. *See* Memo at 7.

72. Copies of each statement you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived and is inapplicable. *See* Memo at 7.

73. Copies of each statement of net worth and listing of assets created in applying for credit or loans which you have completed since July 15, 1989.

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ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: Objection has been waived or is inapplicable, or both. *See* Memo at 7.

74. Copies of correspondence and documents related to any copyright search made regarding "Oh, Pretty Woman."

ANSWER: None.

REASON SUPPORTING MOTION: Response is inconsistent with other documents produced. *See* Memo at 12-17.

75. Each document that discusses ownership of copyright of "Oh, Pretty Woman" or "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: Defendants response is incomplete and inconsistent with Defendants response to request 21, which states that no documents relating to ownership of the copyright for "Oh, Pretty Woman" exist. *See* Memo at 17-19.

76. Documents sufficient to identify each individual who was involved in the performance or production of "Pretty Woman" and his or her respective functions or activities.

Appendix O

ANSWER: The Defendants will produce the requested documents.

REASON SUPPORTING MOTION: Defendants' production is incomplete and inconsistent with Defendants' response to request 16(c). *See* Memo at 17-19.

78. Each document related to each instance in which a copyright claim or concern has been raised with regard to any elements of any of your work.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: The objection has been waived and is inapplicable. *See* Memo at 5-8.

80. Each document which relates to your communications with ASCAP or BMI in Nashville, Tennessee; Los Angeles, California; and New York, New York.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

REASON SUPPORTING MOTION: The objection has been waived and is inapplicable. *See* Memo at 7.

81. Each document that contained instructions or related to the manner in which the search for documents requested in this request for production of documents was performed.

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ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1) - (8) of Instructions . *See* Memo at 1617.

82. Each document consulted in locating or obtaining the documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

83. Each document prepared in response to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

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84. Documents sufficient to identify by name, address, and title or job description each person who searched for documents responsive to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants' claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

85. Each document consulted to determine where to search for documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney client privilege.

REASON SUPPORTING MOTION: Defendants claim of privilege has been waived because of untimeliness. At a minimum, however, Plaintiff is entitled to data in B(1)-(8) of Instructions. *See* Memo at 16-17.

Appendix O

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

DECLARATION OF COUNSEL PURSUANT TO LOCAL RULE 9(E)(3)

Counsel for Plaintiff hereby certify that they have conferred with counsel for Defendants in a good faith effort to resolve by agreement Defendants' insufficient responses to Plaintiff's First Request for Production of Documents and that counsel have not been able to do so.

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Respectfully submitted,
KING & BALLOW

s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219

Appendix O

APPENDIX O — MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
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ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO COMPEL

Plaintiff, Acuff-Rose Music, Inc. ("Acuff-Rose") submits this Memorandum of Law in Support of its Motion to Compel, pursuant to Rule 8(b) of the local Rules of Court for the U.S. District Court for the Middle District of Tennessee.

Appendix O

Introduction

This action is for willful infringement and commercial exploitation of Plaintiff's copyrighted song "Oh, Pretty Woman" and for interference with Plaintiff's business relationships and prospective business advantage. Defendants filed a Motion to Dismiss on the ground that their preparation of a derivative work based on Plaintiff's song is a parody and, therefore, constitutes a fair use. Plaintiff's Response to the Motion to Dismiss points out that Defendants' work was not a parody and/or that they took too much of Plaintiff's work to justify a finding of fair use. In short, Plaintiff's response demonstrates that as a matter of law Defendants are not entitled to summary disposition of this lawsuit and that the parties vigorously dispute genuine issues of material fact.

By serving Plaintiff's first Request for Production of Documents on Defendants with the Summons and Complaint, Plaintiff attempted to expedite the case by narrowing the issues for trial. The scope of Plaintiff's requests for production of documents is tailored to discover information relating to Defendants' use of "Oh, Pretty Woman" to create a derivative work; relating to the willfulness of Defendants infringement of Plaintiff's music and lyrics; relating to Defendants profits from Defendants' infringement; and relating to Defendants' defense of fair use. Despite the reasonable scope of Plaintiff's requests, to date no substantive discovery has been conducted because Defendants, after unexplained delays, have made incomplete, inconsistent, and inadequate responses to Plaintiff's requests.

Instead of full and forthright responses to Plaintiff's requests for production, Defendants belatedly produced 14 pages, which represent documents responsive to only nine of Plaintiff's 85

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requests. Well over a month after producing these 14 pages, Defendants sent Plaintiff 31 additional sheets, which contained such duplicative or fragmentary information that rendered the supplementary production of little use. Again, on November 19, 1990, Defendants produced 23 additional sheets that were only partially responsive.

Thus, some six months after Plaintiff initiated discovery in this lawsuit, Defendants have produced very few documents useful to the resolution of the issues in this lawsuit. Moreover, Defendants' failure to cooperate in discovery is compounded by their unexplained delays in responding in the first place and by their refusal to produce documents responsive to the issue that they themselves raised, *viz.* their claim that the infringing song is a parody. By agreement, the parties set April 1, 1991, as the cut-off date for all discovery. Plaintiff is faced with attempting to complete preparation for additional discovery in the next four months without full access to Defendants' documents. Defendants' refusal to produce documents responsive to Plaintiff's requests has prejudiced and will continue to prejudice Plaintiff by unnecessarily interfering with the expeditious and economical resolution of this lawsuit.

All efforts by Plaintiff's counsel to resolve this matter by conferring with Defendants' counsel have been unsuccessful.

Facts

On July 18, 1990, Plaintiff filed the above-referenced action against Defendants LUTHER R. CAMPBELL, CHRISTOPHER WONGWON, MARK ROSS, DAVID HOBBS, THE 2 LIVE CREW, and LUKE SKYYWALKER RECORDS. Plaintiff served its First Request for Production of Documents on all six

Defendants simultaneously with the Summons and Complaint (Exhibit A). Three Defendants were served on June 19, 20, & 22, 1990. No later than July 12, 1990, the remaining three Defendants were properly served with process and with Plaintiff's request for production (Exhibit B).

At the latest, pursuant to Rule 34 of the Federal Rules of Civil Procedure, all responses to Plaintiff's requests were due to be produced on or before August 27, 1990.[1] Receiving no documents or any other response to the request for production by August 31, 1990, Plaintiff sent Defendants' counsel a letter calling to his attention that Defendants were out of time and requesting delivery of all of the requested documents no later than September 14, 1990. (Exhibit C).

On September 14, 1990, Plaintiff received a response to the document requests, consisting of 14 pages, representing documents responsive to nine of the 85 requests. Defendants interposed objections to 26 requests and responded "None" to 33 requests. (Exhibit D).

On September 25, 1990, Plaintiff wrote to Defendants' counsel specifically setting forth the insufficiencies of the responses and offering to cooperate in setting a time for Defendants to complete and/or supplement their production (Exhibit E). Defendants responded to this offer by stating that "at this time, [Defendants] do not intend to supplement their document production" and suggesting that Plaintiff file a Motion to Compel (Exhibit F). Nevertheless, on October 29, 1990, Defendants produced supplemental documents, consisting of 31 pages, and on

1. In fact, the responses of Defendant Wongwon were due on August 3, 1990, and of Defendants Luke Skyywalker Records and Campbell on August 6, 1990.

November 19, 1990, 23 additional documents. No additional responses have been received or promised.

Although more than four months have elapsed since all defendants were served with these document requests, Defendants' responses are still incomplete.

Argument

I. Defendants' Objections to Plaintiff's First Request for Production of Documents are Waived And Meritless.

A. Waiver

Failure to make a timely response to discovery waives any objections the tardy party might otherwise have had. *Fretz v. Keltner,* 109 F.R.D. 303, 309 (D. Kan. 1985) (Failure to answer or object in a timely manner constitutes a waiver of the right to object, including objections based on privilege); *accord Davis v. Fendler,* 650 F.2d 1154, 1160 (9th Cir. 1981) (failure to timely object waives any objection, even privileged information). *See also,* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2173 (1970) (failure to make timely objections constitutes a waiver).

In the instant case, Defendants' failure to respond to Plaintiff's request for documents on or before August 27, 1990, fully 45 days after service on all Defendants was effected, constituted a waiver of any objections.[2] Accordingly, Defendants

2. Counsel for Defendants apparently claim that Plaintiff granted an extension of time in the August 31, 1990, letter. However, neither Plaintiff's letter nor any conversation between Plaintiff's and Defendants' Counsel supports this erroneous

(Cont'd)

should be ordered to produce all documents responsive to the 26 requests to which they have belatedly interposed objections based on privilege and relevancy.

1. Relevancy

Even if Defendants had not waived all objections by responding belatedly to Plaintiff's discovery, Defendants' objections grounded on relevancy are without merit. Defendants cannot seriously maintain that Plaintiff's requests for documents relating to the album containing the infringing song are irrelevant. Indeed, Defendants have themselves admitted the relevance of requests relating to the album rather than just to the song "Pretty Woman" by agreeing to respond to requests 42, 43, 44, 45, 46, 48(b)(c)(d) & (e), & 53. Having agreed to produce the documents and having failed to object to these requests, Defendants cannot selectively and unilaterally decide that other requests relating to the album are irrelevant. The party resisting discovery has the burden of showing that the discovering party's requests are objectionable. *See United States v. 58.16 Acres of Land Etc.*, 66 F.R.D. 570, (E.D. Ill. 1975) (the burden is on the objecting party to show specifically why request is improper). Because Defendants have conceded that requests relating to the album are relevant, Defendants should produce all documents responsive to requests 28, 32, 39, 40, 47, 48(a), 56, 57 & 80.

(Cont'd)

claim. First, the language of the letter clearly states that Plaintiff will "forgo filing a Motion to Compel" the "overdue discovery" if Defendants will agree to "retrieve all of the requested documents" no later than September 14. The phrases "overdue discovery" and "all of the requested documents" are unambiguous conditions and leave no room for misunderstanding. Plaintiff did not grant Defendants an extension of time to object. Rather, Plaintiff, in a good faith attempt to avoid a discovery dispute, simply reminded Defendants that they were out of time.

Discovery of documents relating to licenses sought for the songs on the album (28), to the dates that the album was recorded (32), to the identities of entities listed on the album label (39 & 40), to the total income the album generated (47 & 57), to where the album was distributed (48(a)), and to public performances of the copyrighted songs on the album (80) is directly relevant to a determination of Defendants' willfulness in infringing Plaintiff's work and to computation of profits resulting from the infringement. Moreover, Plaintiff is entitled to sufficient factual information relating to the creation, sales, and distribution of the album to compute for itself the revenues generated by the infringement.

Defendants also purport to object to requests for tax returns (65 & 66) and for bank records (70, 71, 72, 73) on the ground of relevancy. It is clear that Defendants cannot shield from discovery reasonable inquiries into the revenues generated by the infringement or Defendants' financial status where substantial damages are sought.

Because all Defendants' objections are waived by being out of time and are meritless, Defendants should be ordered to produce all documents withheld on the ground of relevancy.

2. Privilege

Defendants' withholding of other relevant documents on the ground that these documents are privileged is also without merit. Even if Defendants' untimely response to Plaintiff's document request had not waived all objections based on either the attorney client privilege or the work-product doctrine, *see Fretz v. Keltner*, 109 F.R.D. 303, 309 (D. Kan. 1985), Defendants' reliance on the advice of counsel to justify infringement constitutes a waiver of all

information relating to the subject matter of that advice. *Coleco Industries v. Universal City Studios,* 110 F.R.D. 688, 691 (S.D.N.Y. 1986); *In re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982).

Defendants interpose objections to six requests based on both the attorney-client privilege and the work-product doctrine and to two requests based on solely the work-product doctrine. As the following shows, these assertions of privilege are waived and inapplicable.

Defendants attached Luther Campbell's affidavit to their Motion to Dismiss (Exhibit G). Paragraph six of Luther Campbell's affidavit states: "That all correspondence referenced above [Defendants' letter requesting permission to do a "parody" and Plaintiff's letter refusing] was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that [sic] it could be released if so desired." This statement is clear in one respect: it purports to assert that Defendants are not guilty of copyright infringement because legal counsel told them so. This assertion constitutes a defense based on reliance on advice of counsel that, as a matter of law, makes document requests 1, 37, & 38 open to full discovery. *See generally Coleco Industries v. Universal City Studios,* 110 F.R.D. 688, 691 (S.D.N.Y. 1986) (selective disclosure of work product to establish the basis for an opinion of counsel constitutes an implied waiver of all work product relevant to the same issue). *See also N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.,* 117 F.R.D. 83 (M.D.N.C. 1987) (the primary exception to the work-product protection arises when a party raises an issue involving reliance on the attorney's advice).

Document requests 37 & 38 ask for documents relating to reviews of "Pretty Woman" by a musicologist, attorney, or any

advisor and relating to comparisons of "Pretty Woman" and "Oh, Pretty Woman." Mr. Campbell's affidavit affirms that the release of "Pretty Woman" was pursuant to advice of counsel that the song was a parody. The linchpin of Defendants' Motion to Dismiss is this purported defense. To permit Defendants to withhold documents responsive to requests 37 & 38 would allow use of the work-product doctrine as both a sword and a shield. On the one hand, Defendants will be affirmatively raising the defense of counsel's advice and, on the other hand, selectively disclosing only those portions of counsel's advice that protect them. Defendants should be ordered to produce the material that they themselves have made the linchpin of their defense against infringement.

To justify their denial of production of documents relating to "Pretty Woman," Defendants object to document request number one on the grounds of both the work-product doctrine and the attorney client privilege.[3] Defendants object to document request number one on the grounds of both the work-product doctrine and the attorney-client privilege. As with the claim of work-product, Defendants have waived any privilege relating to the advice that counsel gave regarding the subject matter of parody. *See In re Sealed Case,* 676 F.2d 793, 818 (D.C. Cir. 1982) ("When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter. . . ."). *See also, Smith v. Alyeska Pipeline Service Company,* 538 F. Supp. 977, 979 (D. Del. 1982) *Aff'd mem.*, 758 F.2d 668 (1984), *cert. denied,* 471 U.S. 1066, 105 S. Ct. 2142 (1985) (It would be unfair to allow a client to assert the attorney-client privilege and prevent disclosure

3. Defendants also object that the request is overly broad. However, a discovery request relating to information about the particular infringing work in a copyright lawsuit is proper.

of damaging communications while allowing the client to disclose other selected communications solely for self-serving purposes.")

Accordingly, because Defendants' objections are untimely and because Defendants have waived their right to assert a objection based on the work-product doctrine and/or the attorney-client privilege, Defendants should be ordered to produce all documents responsive to requests 1, 37 & 38.

Plaintiff has substantial need for the requested information, which is unavailable from any other source. *See* Fed. R. Civ. P. 26(b)(3). In a lawsuit charging an infringement of Plaintiffs' work by Defendants' work where Defendants rely on the nature of the work as a defense, the relevancy of documents relating to the infringing work, to reviews of the work, and to comparisons of the work to Plaintiff's work is beyond dispute. Moreover, Defendants are the only practicable source for the facts contained in the requested documents. *See generally Eckert v. Fitzgerald,* 119 F.R.D. 297 (D.C. Cir. 1988) (Even if documents containing attorneys' notes had not been waived, no alternative source of the substantially equivalent information required compelled production.)

Documents responsive to requests 1, 37 & 38 are essential to clarify the chronological confusion created by Defendants' limited production and Defendant Campbell's affidavit. Defendant Campbell's affidavit calls into question the version of chronology contained in Defendants' responses. In paragraph 1 of Part I of his affidavit, Mr. Campbell states that he created "Pretty Woman" in May, 1989, and in part II, paragraphs 1 and 2, Mr. Campbell avers that the General Manager of Luke Records requested and was denied permission to use "Oh, Pretty Woman" on July 5 and 17, 1989, respectively. This chronology is consistent with Mr.

Campbell's concluding statement that after the July 5 and 17 exchange of correspondence he obtained advice that because his song was a parody, "it could be released if so desired."

However, the excerpted and fragmentary Record Activity Report Defendants produced (*See* attachments to Exhibit F) shows clearly that sales of the album containing "Pretty Woman" were occurring in June, 1989, before either their July 5 request to use Plaintiff's song and Plaintiff's July 17 refusal or counsel's advice. In addition, two duplicate recording studio track sheets that Defendants produced (*See* attachments to Exhibit F) show that Defendants recorded "Pretty Woman" on March 6, 1989, before Campbell claims he "created" the work.

The inconsistencies in Defendants' version of the chronology show the need for a complete response. If Defendants recorded and released the album containing the infringing song before asking Plaintiff's permission or even obtaining advice of counsel, this fact calls into question Defendants' good faith and Defendant Campbell's sworn version of the chronology. The need to produce all documents responsive to requests 1, 37, & 38 is beyond dispute. Plaintiff has a right to know unequivocally when the song was created and when it was recorded. Moreover, Plaintiff is entitled to know whether Defendants created, recorded, distributed, and marketed the album containing the infringing song before asking for Plaintiff's permission and counsel's advice or after taking these measures.

II. Defendants' Categorical Denials of Access and Incomplete Responses Are Inappropriate.

Defendants respond to 33 of Plaintiff's requests for documents with the word "None." The claim that Defendants have

no responsive documents to so many requests both is inconsistent with the limited production Defendants have made and stretches credulity.

For example, Defendants have produced only summary documents relating to sales reports and none relating to promotional distribution of *As Clean as They Wanna Be* (50 & 51). Similarly, it is inconceivable that an album was marketed with no promotional material prepared for the album (13) and no transactional documents relating to sales and distribution of the album (49). If such work was done by a third party, Plaintiff is entitled to documents that show the identity and role of this third party. Likewise, documents relating to the music, lyrics, and ownership of "Pretty Woman" (17, 18, 20 & 33) and to public performances of the song (31) must exist. In fact, Defendants November 19, 1990, production contains a document indicating that the Defendants might have improperly claimed an ownership interest in "Pretty Woman."

Equally troubling are Defendants categorical responses of "None" to requests for documents relating to the total income from recording "Pretty Woman" and to the amount paid to produce the song (16(a) & (b)), documents that must exist and that must be readily available. Defendants also assert that they can produce no documents responsive to request 34, which asks for information sufficient to identify persons involved in writing, recording, producing, manufacturing, or developing "Pretty Woman." Most certainly, this information must be available in view of Defendant Campbell's affidavit averring that he created "Pretty Woman." Additionally, there must be records showing payment to musicians, arrangers, engineers and other costs incurred in producing the song, or, if payments were made by a third party, correspondence or notations concerning the third party's role.

Other inconsistencies are evident from Defendants categorical responses of "None" to requests asking for royalties from sales of the album (41), for reports of sales of the album (50), and for average profits from album sales (54 & 55). Because Defendants have produced excerpts of Record Activity Reports that contain units and dollar amounts of sales of the album, a categorical "None" in response to requests 41, 54, & 55 is misleading. Furthermore, Defendants' response of "None" to Plaintiff's request for documents evidencing sources for "Pretty Woman" (35) is wholly illogical and inconsistent with their insistence in their Motion to Dismiss that their song is a parody. By definition, parodies have sources.

Other troubling uses of the blanket "None" include responses to requests 6, 8, 12, 14, & 15. Categorical claims were made that no documents exist relating to source material for Defendants' recording of "Pretty Woman," to the music and lyrics of "Oh, Pretty Woman," to documents prepared by, for, or at Defendants' request relating to "Oh, Pretty Woman," to the decision to include "Pretty Woman" on the album, to the use of "Oh, Pretty Woman," and to sources used in creating "Pretty Woman." These responses cannot be accurate in view of Defendants' insistence that their song is a parody of "Oh, Pretty Woman" and that they released the song only after counsel so advised them.

Defendants' claim that no documents exist responsive to Plaintiff's request for annual reports of the corporate Defendant for the past three years (61) is anomalous in view of the statutory requirement of the State of Florida that corporations file such annual reports. *See* Fla. Stat. § 607.357 (attached as Exhibit H).

Defendants' responses to requests 7, 56, & 57 for production are incomplete or inadequate, or both. Defendants' explanation for

not producing documents responsive to Plaintiff's request for musical scores, arrangements, sheet music, lead sheet, orchestration, lyric sheet, and recording relating to "Pretty Woman" (7) is that "no documents exist today. Any documents — *which may have been utilized in the studio no longer exist.*" (emphasis added). This explanation is unsatisfactory and raises more questions than it answers. The request is not limited to documents used in the studio.

Similarly, in response to Plaintiff's request for documents sufficient to show each planned or actual concert or other personal appearance of the 2 Live Crew in Tennessee (56), Defendants explain that "The Defendant never performed the song 'Pretty Woman' in the state of Tennessee," and then purport to interpose a relevancy objection. The request designated *planned* as well as actual concert or personal performance in Tennessee. Notwithstanding the invalidity of the interposed objection, it signals that documents responsive to the request may well exist. Defendants should be ordered to produce all responsive documents.

Moreover, Defendants should be ordered to produce all documents responsive to request 57, which asks for documents evidencing all shipments of musical recordings and other materials into Tennessee. Defendants' response that they "do not maintain shipment records on a state by state basis" is inconsistent with their supplemental production of sheets captioned Accounts Receivable Distributor Listing (Detailed), which shows distribution of something to various countries and states. In view of this computer generated production, Plaintiff can only conclude that Defendants have additional documentary information or data in a computer memory or on disk responsive to request 57. Defendants should produce these documents.

Likewise, Defendants' explanation that there are no documents responsive to request 16(c), which asks for the identities and roles of and payment to those who participated in the recording of "Pretty Woman," is non-responsive. The scope of Plaintiff's request is not limited to participants outside the "corporate defendant" but asks for information relating to "each person on entity" who participated in the recording of the song. Because Defendants' response clearly shows that the requested information is available, Defendants should produce it.

Finally, Defendants' staccato objection based on the work-product and attorney-client privileges that documents responsive to requests 81-85, which deal generally with how the search for documents was conducted, is not responsive to the requests. Defendants have failed to identify the nature and date of the documents, who authored them and to whom they were sent, and the reason for the claimed privilege. This information is especially necessary in this case where Defendants' production has been so incomplete.

III. Defendants Have Failed to Produce all Responsive Documents.

Although Defendants agreed to produce documents responsive to some 19 requests, the produced documents address some, but not all, of the 19 requests. For example, apparently in response to Plaintiff's requests for production of documents sufficient to show the total income received by all Defendants and the gross sales from the album *As Clean As They Wanna Be* (42, 43, 44, 45, 46, & 48(e)), Defendants produced excerpts from a document captioned Record Activity Report for Period 6/27/89 to 9/13/90. The produced portions consist of two partial sheets, numbered "p. 2 and p. 3," and purport to contain records of sales of

the album (*See* attachments to Exhibit F). Over 45 days later, Defendants produced 4 additional sheets captioned Record Activity Report — Detail for Period 1/1/90 to 6/30/90. As the caption indicates, the scope of activity period for the supplemental production is shorter by nine months than for the original production. Defendants should be ordered to produce in its entirety the Record Activity Report — Detail for the period from June 27, 1989 to September 13, 1990. In addition, the fragmentary production gives Plaintiff no way to determine for itself that these six sheets represent the total sales of the album. Furthermore, these six sheets do not contain accounts of any additional income that Defendants' infringing use generated. The relevancy of Defendants' total income and profits is clear in a lawsuit requesting relief under, *inter alia*, 17 U.S.C. 504(a)(1).

Defendants agreed to produce documents relating to the creation and recording of "Pretty Woman," but Defendants produced only duplicate track sheets containing the recording date "3/6/89." The discrepancy between Defendant Campbell's affidavit, which states that he created "Pretty Woman" in June, 1989, and the recording date on these duplicate sheets requires that Defendants produce documents sufficient to show unequivocally the dates the song was created and recorded.

Another example of insufficient production is in response to requests for documents showing the identities and roles of each individual involved in the production of "Pretty Woman" (76). Although Defendants agree to produce the requested documents, none has been produced. Furthermore, Defendants' insistence that no responsive documents relating to copyright ownership for "Oh, Pretty Woman" (21) and to the identities of and payment to each person or entity involved in the recording of "Pretty Woman" (16(c)) exist is inconsistent with the limited numbers of documents already produced.

IV. Defendants Should be Ordered to Pay the Reasonable Expenses, Including Attorney's Fees, Incurred by Plaintiff in Moving to Compel Discovery.

Rule 37(a)(4) provides for the allowance of expenses and attorney's fees incurred by the moving party in the preparation and filing of a Rule 37 motion to compel discovery. Rule 37 states in pertinent part:

> (4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(4).

The language of this rule is clear that where a motion is granted the court shall award expenses, including attorneys' fees to the moving party. The Court should award Acuff-Rose the costs incurred in preparing this motion to compel necessitated by Defendants' unjustified opposition to discovery. *H. K. Porter v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1124-25 (6th Cir. 1976).

In view of the paucity of production and multiplicity of unmeritorious and/or waived objections, any opposition to this

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motion to compel would not be justified, and no other circumstances exist to make an award of expenses unjust.

Conclusion

For the foregoing reasons, the court should grant Plaintiff's Motion to Compel Productions of Documents.

Respectfully submitted,
KING & BALLOW
s/ Elizabeth B. Marney
Alan L. Marx
E. Andrew Norwood
Elizabeth B. Marney
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219

Of Counsel:

Hal Willis
ACUFF-ROSE MUSIC, INC.

Appendix O

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Memorandum of Law in Support of Motion to Compel was duly served this 14 day of December, 1990, by U.S. Mail, postage prepaid, addressed as follows:

Alan M. Turk, Esq.
3310 West End Avenue
Nashville, Tennessee 37203

s/ Elizabeth B. Marney
Elizabeth B. Marney

Appendix O

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3-90-0524
JURY DEMAND
Judge Wiseman

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT THE 2 LIVE CREW

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiff Acuff-Rose Music, Inc. hereby requests that the Defendant, The 2 Live Crew, produce the documents and things designated below for inspection and copying at the offices of King

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& Ballow, 1200 Noel Place, 200 Fourth Avenue North, Nashville, Tennessee, at 10:00 a.m. no later than 30 days after receipt of service of the Summons and Complaint in this action if the Court so orders.

I. DEFINITIONS

As used herein —

A. "You" or "your" means and refers to the Defendant, The 2 Live Crew.

B. "Skyywalker Records" means and refers to the Defendant, Skyywalker Records, its present and former officers, directors, employees, partners, members, agents, and other persons, including attorneys, acting on their behalf, and each affiliated company or business entity and their present and former officers, directors, employees, partners, members, agents, and other persons, including attorneys that act on behalf of Skyywalker Records.

C. "The 2 Live Crew" means and refers to Defendants Luther Campbell, Christopher Wongwon, Mark Ross, David Hobbs, individually, and as the vocal group The 2 Live Crew.

D. "Acuff-Rose Music, Inc." means and refers to Plaintiff Acuff-Rose Music, Inc., its present and former officers, directors, employees, partners, members, agents, and other persons, including attorneys, acting on its behalf.

E. "Defendants" means the defendants in the lawsuit filed in the U.S. District Court for the Middle District of Tennessee, styled *Acuff-Rose Music, Inc. v. Luther Campbell, et al.*

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F. "Person" means any natural person, artificial person, corporation, firm, company, sole proprietorship, partnership, joint venture, limited partnership, business association or other entity having legal existence.

G. "Document" means and relates to any written, printed, typed, recorded, taped, or other graphic matter of any kind fixed in any tangible medium of expression, which is in your possession, care, custody or control, including copies that contain information that differs from the original through marginalia, annotation, emphasis, or deletion. This definition includes documents with respect to which you may assert any privilege.

H. "Communications" means and relates to each transmission of information by oral, graphic, written, pictorial, or otherwise perceptible means, including, but not limited to, telephone conversations, letters, documents, memoranda, telegrams, facsimile transmissions, meetings, and personal conversations.

I. "Oh, Pretty Woman" means and relates to each version of the copyrighted work that is alleged to have been infringed in the Complaint in *Acuff-Rose Music, Inc. v. Luther Campbell, et al.*

J. "Pretty Woman" refers to that version or any variation thereof of the song entitled "Pretty Woman" performed by The 2 Live Crew and contained on the album *As Clean As They Wanna Be*, including but not limited to any music, lyrics, notes, videos, preparatory documents, masters, outtakes, and any other materials used in connection with the creation or production of this song. This definition also includes each preliminary draft of any of the above.

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K. "Relates to" means constitutes, contains, records, discusses, summarizes, analyzes, discloses, or refers to, in whole or in part.

L. "Including" means including but not limited to.

M. "And" and "or" shall be construed either conjunctively or disjunctively as necessary to bring within the scope of this document request any information or document that might otherwise be construed to be outside its scope.

N. References to the plural shall include the singular; references to the singular shall include the plural.

O. References to the feminine shall include the masculine; references to the masculine shall include the feminine.

II. INSTRUCTIONS

A. Unless otherwise stated, the period covered by this request for production is the period between July 15, 1988, and the date you receive this request, but this time specifically does not alter your obligations under Federal Rule of Civil Procedure 26(e) and Local Rule 9 of the Middle District of Tennessee seasonably to supplement your responses.

B. For each document for which you assert a claim of privilege, provide the following information:

1. the name of the author;

2. the name of the person to whom the document was addressed or sent;

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3. the name of each person other than the author and recipient who has seen the document;

4. the date shown on the document and the date the document was created, if different;

5. the number of pages in the document;

6. a brief statement of the subject matter;

7. the nature of the privilege being asserted; and

8. the number of the paragraph of this request to which the document is otherwise responsive.

III. SCHEDULE OF DOCUMENTS

1. Each document that relates to "Pretty Woman."

2. Each document that relates to "Oh, Pretty Woman."

3. Each document that you sent to Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

4. Each document that you received from Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

5. A copy of each recorded version of "Pretty Woman."

6. A copy of your source material for your recording of "Pretty Woman."

7. A copy of each musical score, musical arrangement,

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printed sheet music, lead sheet, orchestration, lyric sheet, and recording in any form relating to "Pretty Woman."

8. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet and recording in any form relating to "Oh, Pretty Woman."

9. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Pretty Woman" was discussed.

10. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Oh, Pretty Woman" was discussed.

11. Each document prepared by, for, or at your request, or the request of any Defendant or Defendants relating to any recording of "Pretty Woman."

12. Each document prepared by, for, or at your request or the request of any Defendant or Defendants relating to "Oh, Pretty Woman."

13. Each document that relates to promotional material prepared for the album by The 2 Live Crew titled *As Clean As They Wanna Be*.

14. Each document that relates to the facts and circumstances surrounding the decision to include "Pretty Woman" on the album *As Clean As They Wanna Be*.

15. Each document that discusses your use of "Oh, Pretty Woman."

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16. Documents sufficient to show separately each of the following:

a. the total amount of income you received from the recording of "Pretty Woman";

b. the total amount you paid to produce "Pretty Woman";

c. the name, business affiliation, address, telephone number, service performed or product provided, and the amount of the payment for each person or entity that received payment for services or products related to the recording of "Pretty Woman."

17. Each document that relates to each attempt to create lyrics for "Pretty Woman."

18. Each document that relates to each attempt to create music for "Pretty Woman."

19. Each document that relates to each communication between you and any of the Defendants and between the Defendants and any other persons, concerning the actual, proposed, or possible use of the music and lyrics of "Oh, Pretty Woman."

20. Each document that relates to the ownership of the copyright for "Pretty Woman."

21. Each document that relates to the ownership of the copyright for "Oh, Pretty Woman."

22. Each document that relates to each communication with Acuff-Rose Music, Inc., concerning the actual, proposed, or

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possible use of the music, lyrics or other copyrighted elements of "Oh, Pretty Woman."

23. Each document that relates to each communication between you and any other person concerning the actual, proposed, or possible use of the music, lyrics, or other copyrighted elements of "Oh, Pretty Woman."

24. Each document that relates to the rejection by Acuff-Rose Music, Inc., or any other person, of your request to use the lyrics, music, or other copyrighted elements of "Oh, Pretty Woman."

25. Each document that relates to each communication between you and Acuff-Rose Music, Inc., relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

26. Each document that relates to each communication between you and any person relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

27. Each document that relates to each communication with Acuff-Rose Music, Inc., or any other person, for a license for the use of "Oh, Pretty Woman" on the album *As Clean As They Wanna Be*, or any other use.

28. Each document that relates to each request you made for a license for each song on the album *As Clean As They Wanna Be* from any person.

29. Documents sufficient to show the date of the creation of "Pretty Woman."

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30. Documents sufficient to show the date of the recording of "Pretty Woman."

31. Documents sufficient to identify each time and place "Pretty Woman" was performed publicly.

32. Documents sufficient to show the date(s) that the album *As Clean As They Wanna Be* was recorded.

33. Each document that relates to music, lyrics, or concepts proposed or considered for *As Clean As They Wanna Be*.

34. Documents sufficient to identify by name, business affiliation, address, and telephone number each person involved in writing, recording, producing, manufacturing, or developing "Pretty Woman."

35. Each document used as a source in creating "Pretty Woman."

36. Each document that relates to each alternative version of "Pretty Woman."

37. Each document that relates to the review of "Pretty Woman" by a musicologist, attorney, or any advisor.

38. Each document that relates to or contains a comparison of the music or lyrics of "Pretty Woman" with the music or lyrics of "Oh, Pretty Woman."

39. Documents sufficient to identify Pac Jam Publishing (BMI).

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40. Documents sufficient to identify the Ghetto Style DJ's.

41. Each document related to all royalties received by you from the sale of *As Clean As They Wanna Be*.

42. Documents sufficient to show the total income received by you, Luke Skyywalker Records, Luke, Inc., or any other entity from the album *As Clean As They Wanna Be*.

43. Documents sufficient to show the total income received by you from the album *As Clean As They Wanna Be*.

44. Documents sufficient to show the total income received by Christopher Wongwon from the album *As Clean As They Wanna Be*.

45. Documents sufficient to show the total income received by Mark Ross from the album *As Clean As They Wanna Be*.

46. Documents sufficient to show the total income received by David Hobbs from the album *As Clean As They Wanna Be*.

47. Documents sufficient to show the total income received by each person other than the members of The 2 Live Crew from the album *As Clean As They Wanna Be*.

48. Documents sufficient to show:

a. the date and destination of each shipment of *As Clean As They Wanna Be;*

b. the price paid to you for each copy of *As Clean As They Wanna Be;*

c. the total number of copies thus far manufactured of *As Clean As They Wanna Be;*

d. the total number of copies of *As Clean As They Wanna Be* that have been sold, both at the wholesale and retail levels;

e. the total dollar amount of income generated by the sale of *As Clean As They Wanna Be*.

49. Copies of all contracts with wholesalers, retailers, distributors and any other sellers or dealers of *As Clean As They Wanna Be*.

50. Each document that relates to reports sent to or prepared for you regarding the sales of *As Clean As They Wanna Be*.

51. Documents sufficient to show the total number of copies of *As Clean As They Wanna Be* distributed for promotional purposes.

52. Documents sufficient to show the retail selling price and the wholesale price of *As Clean As They Wanna Be*.

53. Each document that relates to payment of mechanical or other royalties regarding the sales of *As Clean As They Wanna Be*.

54. Documents sufficient to show your average profit per copy of *As Clean As They Wanna Be*.

55. Documents sufficient to show your average profit per month on the sale of *As Clean As They Wanna Be* for each month since the release of *As Clean As They Wanna Be*, including any advance sales.

56. Contracts, agreements, memoranda, letters and other documents sufficient to show each planned or actual concert or other personal appearance by The 2 Live Crew in Tennessee.

57. Contracts, agreements, memoranda, letters and other documents sufficient to show each shipment of musical recordings and other materials by you into Tennessee, including, but not limited to, items such as jackets, T-shirts, posters, caps, and buttons.

58. A copy of the certificate of incorporation for Luke Skyywalker Records and Luke, Inc.

59. A copy of the certificate of incorporation for each corporation in which you hold more than a five percent interest.

60. A copy of any articles of association or partnership to which you are a party or on which your name appears.

61. A copy of each annual report of Luke Skyywalker Records and Luke, Inc. since 1987.

62. Each document related to any subsidiaries of Luke Skyywalker Records or Luke, Inc.

63. A copy of each annual report for any entity in which you or Luke, Inc. owns more than a five percent interest.

64. A copy of Luke Skyywalker Records' most recent audited financial report.

65. A copy of your tax returns since January 1, 1989, including all attachments.

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66. A copy of all tax returns and attachments for any organization in which you or Luke, Inc. owns more than a five percent interest.

67. Documents sufficient to show your policy, practice, or procedure in retaining or discarding documents.

68. Each document related to your retention or destruction of any documents.

69. Documents sufficient to show the full names, mailing, business, and residence addresses and phone numbers of you, Luke, Inc., Christopher Wongwon, Mark Ross, and David Hobbs.

70. Documents sufficient to show the accounts you or Luke, Inc., or any organization in which you held more than a five percent interest, maintained since July 15, 1989, in any bank, savings institution, mutual account, fund, or trust.

71. A copy of each deposit receipt you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989 .

72. Copies of each statement you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

73. Copies of each statement of net worth and listing of assets created in applying for credit or loans which you have completed since July 15, 1989.

74. Copies of correspondence and documents related to any copyright search made regarding "Oh, Pretty Woman."

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75. Each document that discusses ownership of copyright of "Oh, Pretty Woman" or "Pretty Woman."

76. Documents sufficient to identify each individual who was involved in the performance or production of "Pretty Woman" and his or her respective functions or activities.

77. Each document that discusses the use of sampling or any other mechanical technique for the production of "Pretty Woman."

78. Each document related to each instance in which a copyright claim or concern has been raised with regard to any elements of any of your work.

79. Each document you sent to or received from any person related to "Pretty Woman."

80. Each document which relates to your communications with ASCAP or BMI in Nashville, Tennessee; Los Angeles, California; and New York, New York.

81. Each document that contained instructions or related to the manner in which the search for documents requested in this request for production of documents was performed.

82. Each document consulted in locating or obtaining the documents requested in this request for production of documents.

83. Each document prepared in response to this request for production of documents.

84. Documents sufficient to identify by name, address, and title or job description each person who searched for documents

responsive to this request for production of documents.

85. Each document consulted to determine where to search for documents requested in this request for production of documents.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served with the initial process, including Summons and Complaint, upon the following:

Bruce S. Rogow, Esq.
Professor of Law
Nova University Law Center
Nova University
Fort Lauderdale, Florida 33314

Luther R. Campbell, a/k/a Luke Skyywalker
3050 Biscayne Boulevard
Miami, Florida 33137

Christopher Wongwon, a/k/a Fresh Kid Ice
13165 North West 11th Avenue
Miami, Florida 33168

Mark Ross, a/k/a Brother Marquis
3050 Biscayne Boulevard
Miami, Florida 33137

David Hobbs, a/k/a Mr. Mixx
3050 Biscayne Boulevard
Miami, Florida 33137

The 2 Live Crew
3050 Biscayne Boulevard
Miami, Florida 33137

Luke Skyywalker Records
3050 Biscayne Boulevard
Miami, Florida 33137

s/ Elizabeth B. Marney

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EXHIBIT B

KING & BALLOW
LAW OFFICES
1200 NOEL PLACE
200 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219

TELEPHONE: 615/259-3456
TELECOPY: 615/254-7907

July 12, 1990

HAND DELIVERED

Alan Turk, Esq.
3310 West End Avenue
Nashville, TN 37203

Re: Acuff-Rose v. Luther R. Campbell et al.

Dear Alan:

Pursuant to your representation that you will accept service on behalf of all defendants in the referenced lawsuit, please find enclosed the Summons, Complaint, and Plaintiff's First Request for Production of Documents for Mark Ross, David Hobbs, and The 2-Live Crew.

Sincerely,

s/ Betty Marney
Elizabeth B. Marney

EBM/am
Enclosures

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EXHIBIT C

KING & BALLOW
LAW OFFICES
1200 NOEL PLACE
200 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219

TELEPHONE: 615/259-3456
TELECOPY: 615/254-7907

August 31, 1990

VIA FACSIMILE

Alan Turk, Esq.
3310 West End Avenue
Nashville, TN 37203

Re: Acuff-Rose, Inc. v. The Two Live Crew
Dear Alan:

Since I have been unable to reach you today, I am writing in regard to your overdue discovery in the referenced lawsuit.

Our client is understandably anxious to have the documents we requested. However, we understand your logistical difficulties and are willing to work with you.

To that end, we will be willing to forgo filing a Motion to Compel for the present if you will send us a letter stating that you will retrieve all of the requested documents from your client and

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deliver them to us no later than Friday, September 14, 1990.

If you are unable to agree to this offer or to meet this timetable, please let us know immediately so that we can discuss this matter. If we cannot come to an understanding, we will be forced to file a Motion to Compel Production.

Therefore, please advise us of your decision by the end of business Tuesday, September 4, 1990.

Sincerely,

s/ Andy Norwood
E. Andrew Norwood

EBM/tt

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

1. Each document that relates to "Pretty Woman."

ANSWER: OBJECTION. The Plaintiff's request is overly broad in accordance with Rule 26 of the Federal Rules of Civil

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Procedure as defined in definition K of the Plaintiff's First Set of Request for Production of Documents. The Defendants have produced all relevant documents concerning "Pretty Woman." The Defendants further object to the production of other documents which "relate" to the song "Pretty Woman" because said documents are protected under the attorney work product privilege and the attorney-client privilege.

2. Each document that relates to "Oh, Pretty Woman."

ANSWER: None.

3. Each document that you sent to Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

4. Each document that you received from Acuff-Rose Music, Inc., relating to either "Pretty Woman" or "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

5. A copy of each recorded version of "Pretty Woman."

ANSWER: The Defendants will produce a requested copy.

6. A copy of your source material for your recording of "Pretty Woman."

ANSWER: None.

7. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet, and recording in

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any form relating to "Pretty Woman."

ANSWER: No documents exist today. Any documents which may have been utilized in the studio no longer exist.

8. A copy of each musical score, musical arrangement, printed sheet music, lead sheet, orchestration, lyric sheet and recording in any form relating to "Oh, Pretty Woman."

ANSWER: None.

9. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Pretty Woman" was discussed.

ANSWER: None.

10. Each document that relates to each meeting you attended, or any Defendant or Defendants attended, at which "Oh, Pretty Woman" was discussed.

ANSWER: None.

11. Each document prepared by, for; or at your request, or the request of any Defendant or Defendants relating to any recording of "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

12. Each document prepared by, for, or at your request, or the request of any Defendant or Defendants, relating to "Oh, Pretty Woman."

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ANSWER: None.

13. Each document that relates to promotional material prepared for the album by The 2 Live Crew titled *As Clean As They Wanna Be*.

ANSWER: None.

14. Each document that relates to the facts and circumstances surrounding the decision to include "Pretty Woman" on the album *As Clean As They Wanna Be*.

ANSWER: None.

15. Each document that discusses your use of "Oh, Pretty Woman."

ANSWER: None.

16. Documents sufficient to show separately each of the following:

a. the total amount of income you received from the recording of "Pretty Woman."

ANSWER: None.

b. the total amount you paid to produce "Pretty Woman";

ANSWER: None.

c. the name, business affiliation, address, telephone number, service performed or product provided, and the amount of the

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payment for each person or entity that received payment for services or products related to the recording of "Pretty Woman".

ANSWER: None. All of the participants associated with the recording of "Pretty Woman" were employees of the corporate defendant. The studio where "Pretty Woman" was recorded is owned by the corporate Defendant.

17. Each document that relates to each attempt to create lyrics for "Pretty Woman".

ANSWER: None.

18. Each document that relates to each attempt to create music for "Pretty Woman."

ANSWER: None.

19. Each document that relates to each communication between you and any of the Defendants and between the Defendants and any other persons, concerning the actual, proposed, or possible use of the music and lyrics of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

20. Each document that relates to the ownership of the copyright for "Pretty Woman."

ANSWER: None.

21. Each document that relates to the ownership of the copyright for "Oh, Pretty Woman."

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ANSWER: None.

22. Each document that relates to each communication with Acuff-Rose Music, Inc., concerning the actual, proposed, or possible use of the music, lyrics, or other copyrighted elements of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

23. Each document that relates to each communication between you and any other person concerning the actual, proposed, or possible use of the music, lyrics, or other copyrighted elements of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

24. Each document that relates to the rejection by Acuff-Rose Music, Inc., or any other person, of your request to use the lyrics, music, or other copyrighted elements of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

25. Each document that relates to each communication between you and Acuff-Rose, Music, Inc., relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

26. Each document that relates to each communication between you and any person relating to the actual, proposed, or possible preparation of a derivative work of "Oh, Pretty Woman."

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ANSWER: The Defendants will produce the requested documents.

27. Each document that relates to each communication with Acuff-Rose Music, Inc., or any other person, for a license for the use of "Oh, Pretty Woman" on the album *As Clean As They Wanna Be*, or any other use.

ANSWER: The Defendants will produce the requested documents.

28. Each document that relates to each request you made for a license for each song on the album *As Clean As They Wanna Be* from any person.

ANSWER: OBJECTION. The Defendants request for any license for any song on the album *As Clean As They Wanna Be* is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

29. Documents sufficient to show the date of the creation of "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

30. Documents sufficient to show the date of the recording of "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

31. Documents sufficient to identify each time and place "Pretty Woman" was performed publicly.

ANSWER: None.

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32. Documents sufficient to show the date(s) that the album *As Clean As They Wanna Be* was recorded.

ANSWER: OBJECTION. The Defendants have produced documents which evidences when the song "Pretty Woman" was recorded, March 6, 1989. The songs contained on the album *As Clean As They Wanna Be* were recorded on different dates during a several month period. The Defendants object to the production of these documents as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

33. Each document that relates to music, lyrics, or concepts proposed or considered for *As Clean As They Wanna Be*.

ANSWER: None.

34. Documents sufficient to identify by name, business affiliation, address, and telephone number each person involved in writing, recording, producing, manufacturing, or developing "Pretty Woman."

ANSWER: None.

35. Each document used as a source in creating "Pretty Woman."

ANSWER: None.

36. Each document that relates to each alternative version of "Pretty Woman."

ANSWER: None.

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37. Each document that relates to the review of "Pretty Woman" by a musicologist, attorney, or any advisor.

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

38. Each document that relates to or contains a comparison of the music or lyrics of "Pretty Woman" with the music or lyrics of "Oh, Pretty Woman."

ANSWER: OBJECTION. The Defendants object to the production of the requested documents and rely upon the attorney work product privilege.

39. Documents sufficient to identify Pac Jam Publishing (BMI).

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

40. Documents sufficient to identify the Ghetto Style DJ's.

ANSWER: OBJECTION. The Defendants object to the production of the requested documentation as not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

41. Each document related to all royalties received by you from the sale of *As Clean As They Wanna Be*.

ANSWER: None.

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42. Documents sufficient to show the total income received by you, Luke Skyywalker Records, Luke, Inc., or any other entity from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

43. Documents sufficient to show the total income received by you from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

44. Documents sufficient to show the total income received by Christopher Wongwon from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

45. Documents sufficient to show the total income received by Mark Ross from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

46. Documents sufficient to show the total income received by David Hobbs from the album *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

47. Documents sufficient to show the total income received by each person other than the members of The 2 Live Crew from the album *As Clean As They Wanna Be*.

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible.

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The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

48. Documents sufficient to show:

a. the date and destination of each shipment of *As Clean As They Wanna Be;*

ANSWER: OBJECTION. The documents requested by the Plaintiff would be very burdensome to produce if not impossible. The Defendants would state that the documents requested are not relevant in accordance with Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

b. the price paid to you for each copy of *As Clean As They Wanna Be;*

ANSWER: See the Record Activity Report which is produced.

c. the total number of copies thus far manufactured of *As Clean As They Wanna Be;*

ANSWER: The Defendants will produce the requested documents.

d. the total number of copies of *As Clean As They Wanna Be* that have been sold, both at the wholesale and retail levels;

ANSWER: The Defendants will produce the requested documents as to the total number of copies of *As Clean As They Wanna Be* sold at the wholesale level. The Defendants do not have any documents

evidencing the sale of *As Clean As They Wanna Be* at the retail level.

e. the total dollar amount of income generated by the sale of *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce documents sufficient to show the gross sales of *As Clean As They Wanna Be*.

49. Copies of all contracts with wholesalers, retailers, distributors and any other sellers or dealers of *As Clean As They Wanna Be*.

ANSWER: None.

50. Each document that relates to reports sent to or prepared for you regarding the sales of *As Clean As They Wanna Be*.

ANSWER: None.

51. Documents sufficient to show the total number of copies of *As Clean As They Wanna Be* distributed for promotional purposes.

ANSWER: None.

52. Documents sufficient to show the retail selling price and the wholesale price of *As Clean As They Wanna Be*.

ANSWER: None.

53. Each document that relates to payment of mechanical or other royalties regarding the sales of *As Clean As They Wanna Be*.

ANSWER: The Defendants will produce the requested documents.

54. Documents sufficient to show your average profit per copy of *As Clean As They Wanna Be*.

ANSWER: None.

55. Documents sufficient to show your average profit per month on the sale of *As Clean As They Wanna Be* for each month since the release of *As Clean As They Wanna Be*, including any advance sales.

ANSWER: None.

56. Contracts, agreements, memoranda, letters and other documents sufficient to show each planned or actual concert or other personal appearance of The 2 Live Crew in Tennessee.

ANSWER: OBJECTION. The Defendant never performed the song "Pretty Woman" in the State of Tennessee. The Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

57. Contracts, agreements, memoranda, letters and other documents sufficient to show each shipment of musical recordings and other materials by you into Tennessee, including, but not limited to, items such as jackets, T-shirts, posters, caps, and buttons.

ANSWER: OBJECTION. The Defendants do not maintain shipment records on a state by state basis. The Defendants have not utilized the words "Pretty Woman" on any jacket, T-shirt, poster, cap, and/or button. Therefore, the Plaintiff's request is not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

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58. A copy of the certificate of incorporation for Luke Skyywalker Records and Luke, Inc.

ANSWER: The Defendants will produce the requested documents.

59. A copy of the certificate of incorporation for each corporation in which you hold more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

60. A copy of any articles of association or partnership to which you are a party or on which your name appears.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

61. A copy of each annual report of Luke Skyywalker Records and Luke, Inc., since 1987.

ANSWER: None.

62. Each document related to any subsidiaries of Luke Skyywalker Records or Luke, Inc.

ANSWER: None.

63. A copy of each annual report for any entity in which you or Luke, Inc. owns more than a five percent interest.

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ANSWER: None.

64. A copy of Luke Skyywalker Records' most recent audited financial report.

ANSWER: None.

65. A copy of your tax returns since January 1, 1989, including all attachments.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

66. A copy of all tax returns and attachments for any organization in which you or Luke, Inc. owns more than a five percent interest.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

67. Documents sufficient to show your policy, practice, or procedure in retaining or discarding documents.

ANSWER: None.

68. Each document related to your retention or destruction of any documents.

ANSWER: None.

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69. Documents sufficient to show the full names, mailing, business, and residence addresses and phone number of you, Luke, Inc., Christopher Wongwon, Mark Ross, and David Hobbs.

ANSWER: The Defendants will produce the requested documents.

70. Documents sufficient to show the accounts you or Luke, Inc., or any organization in which you held more than a five percent interest, maintained since July 15, 1989, in any bank savings institution, mutual account, fund, or trust.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

71. A copy of each deposit receipt you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

72. Copies of each statement you received from any bank, savings institution, mutual account, fund, or trust since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

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73. Copies of each statement of net worth and listing of assets created in applying for credit or loans which you have completed since July 15, 1989.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

74. Copies of correspondence and documents related to any copyright search made regarding "Oh, Pretty Woman."

ANSWER: None.

75. Each document that discusses ownership of copyright of "Oh, Pretty Woman" or "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

76. Documents sufficient to identify each individual who was involved in the performance or production of "Pretty Woman" and his or her respective functions or activities.

ANSWER: The Defendants will produce the requested documents.

77. Each document that discusses the use of sampling or any other mechanical technique for the production of "Pretty Woman."

ANSWER: None.

78. Each document related to each instance in which a copyright claim or concern has been raised with regard to any elements of any of your work.

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ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

79. Each document you sent to or received from any person related to "Pretty Woman."

ANSWER: The Defendants will produce the requested documents.

80. Each document which relates to your communications with ASCAP or BMI in Nashville, Tennessee; Los Angeles, California; and New York, New York.

ANSWER: OBJECTION. The documents sought by the Plaintiff are not relevant under Rule 26 of the Federal Rules of Civil Procedure and will not lead to the discovery of relevant information.

81. Each document that contained instructions or related to the manner in which the search for documents requested in this request for production of documents was performed.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

82. Each document consulted in locating or obtaining the documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

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83. Each document prepared in response to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

84. Documents sufficient to identify by name, address, and title or job description each person who searched for documents responsive to this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

85. Each document consulted to determine where to search for documents requested in this request for production of documents.

ANSWER: OBJECTION. The documents sought by the Plaintiff are protected by the attorney work product privilege and the attorney-client privilege.

Respectfully submitted,

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

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CERTIFICATE OF SERVI CE

I hereby certify that the original Answers to Request for Production of Documents was mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 14th day of September, 1990.

s/ Alan Mark Turk
ALAN MARK TURK

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EXHIBIT — RECORD ACTIVITY REPORT

(Omitted Here But Submitted Separately As Lodging)

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July 5, 1989

GARY TEIFER
Opryland, USA
P.O. Box 121900
Nashville, TN 37312-1900

RE: "Pretty Woman"

Dear Mr. Teifer:

As the General Manager of Skyywalker Records, I would like to inform you of "Two Live Crew's" desire to do a parody on the above captioned song.

In the event you have not heard of this group, they are one of the most successful rap groups in the country today. This LP will be their third release and the previous two have gone Gold and are close to Platinum.

At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain to what Weird Al Yankovic and other satirical artists are doing.

We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a

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novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Sincerely,

Linda Fine
General Manager

Encl.
(cassette/lyric sheet)

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ACUFF-ROSE MUSIC, INC.
MILEXS MUSIC, INC.

VIA FAX AND MAIL

May 23, 1990

Jeanne Ramdin
CMRRA
36 Wellesley St. West
Suite 320
Toronto, Ontario MSS 2S4

RE: "OH PRETTY WOMAN" — License number 9007-03518

Dear Joanne:

We are refusing the attached license due to the unauthorized version of the lyric used on this song by the artists '2 Live Crew'.

Permission was not granted to create new lyrics on this composition.

If you have any questions, or need addition information, please feel free to contact me directly.

Sincerely,
s/ Julie Allmand
Julie Allmand
Copyright Dept.
Opryland Music Group, Inc.

cc: Peggy Lamb/Copyright
Jerry Flowers/Dir. of Pub.
Hal Willis/Legal

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WEA
Music of Canada, Ltd,
A Warner Communications Company

Warner/Elektra/Atlantic

May 28, 1990

Ms. Peggy Lamb, Copyright Dep't.
Opryland Music Group
65 Music Square, West
Nashville, Tn.
37203.

Dear Peggy:

Re: "Oh Pretty Woman"

Further to last week's conversation concerning the use of "Oh Pretty Woman" by the group 2 Live Crew, WEA Music of Canada proposes to pay all royalties due on the song to CMRRA for sales to the end of June, 1990, along with any money in reserve. This payment will take place in the usual manner, on August 15. We will then, subject to the approval of Skyywalker Records, remove the song from the album.

As far as liability on inventory is concerned, I suggest that we wait until after the June quarterly payment has been made before assessing an amount, as we expect to see returns by then.

A copy of this letter to Skyywalker Records will serve as our request for their authorization to take the song off of the 2 Live Crew album. If you are in agreement with our proposal, please

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advise me in writing by June 15, so that we can make preparations for the September quarter.

Sincerely,
s/ Jim Agnew
Jim Agnew
Royalty Manager

cc: Stan Kulin
Dave Tollington
Bruce Mattavish
Luther Campbell
Milton Rothman

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WEA
Music of Canada, Ltd.
A Warner Communications Company
Warner/Elektra/Atlantic

May 28, 1990

REGISTERED MAIL

Mr. Luther Campbell
c/o Skyywalker Records
3050 Biscayne Blvd., Suite 307
Liberty City, Fla.
U.S.A.
33137

Dear Luther:

Re: "Oh Pretty Woman"

Enclosed are copies of Opryland Publishing's letter to CMRRA, along with our response, concerning the use of the song "Oh Pretty Woman" on the 2 Live Crew album.

Pursuant to Paragraph 21 of our agreement, WEA Music of Canada intends to remove the song from the album "As Clean as they Wanna Be", effective with all units manufactured as of July 1, 1990.

Please indicate your approval by signing below and returning this letter to me by June 19, 1990. Should you have any questions, please contact me as soon as possible.

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Sincerely,
s/ James E. Agnew
James E. Agnew
Royalty Manager

ACCEPTED AND AGREED

_____
Skyywalker Records

DATE: _____

cc: Stan Kulin
Dave Tollington
Bruce Mactavish
Milton Rothman

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OPRYLAND
MUSIC GROUP
ACUFF-ROSE MUSIC, INC.
MILENE MUSIC, INC.

July 17, 1989

Linda Fine
General Manager
SKYWALKER RECORDS
Suite 307
3050 Biscayne Blvd.
Miami, FL 33137

Dear Linda:

In response to your letter of July 5, 1989 regarding "Oh, Pretty Woman", I called your office, but was unable to contact you.

I am aware of the success enjoyed by "The 2 Live Crews", but I must inform you that we cannot permit the use of a parody of "Oh, Pretty Woman".

Sincerely,
s/ Gerry Teifer
Gerry Teifer

GT/jmn

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EXHIBIT — 2 LIVE CREW TRACK CHART FOR PRETTY WOMAN

(Omitted Here But Submitted Separately As Lodging)

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1. David Hobbs
   16401 N.E. Second Avenue
   Miami, Florida 33162
   Phone: (305) 381-1974

2. Mark Ross
   14330 N.W. 13th Avenue
   Miami, Florida 33167
   Phone: (305) 769-0667

3. Christopher Wongwon
   13161 N.W. 11th Street
   Miami, Florida 33168
   Phone: (305) 687-7205

4. Luther Campbell
   7180 N. Oakmont Drive
   Miami, Florida 33138
   Phone: (305) 757-2041

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State of Florida

Department of State

I certify that the attached is a true and correct copy of the Articles of Amendment, filed on June 29, 1990, to Articles of Incorportion for SKYYWALKER RECORDS, INC., changing its name to LUKE RECORDS, INC., a Florida corporation, as shown by the records of this office.

The document number of this corportion is M34847.

Given under my hand and the
Great Seal of the State of Florida,
at Tallahassee, the Capital, this the
2nd Day of July, 1990.

Jim Smith
Secretary of State

[seal]
Grant Seal of the State of Florida
In God We Trust

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[stamped]
FILED
1990 JUNE 29 AM 11:08
SECRETARY OF STATE
TALLAHASSEE, FLORIDA

SKYYWALKER RECORDS, INC.
ARTICLES OF AMENDMENT

Pursuant to Florida Statutes, Chapter 607.187, the Articles of Incorporation of the above-named corporation are hereby amended as follows:

1. Article I is hereby amended to read as follows:

"The name of this corporation shall be:

"Luke Records, Inc."

2. The foregoing Amendment was adopted by the sole Director and sole Shareholder of this corporation by execution of that certain "Written Statement Manifesting Intention that Amendment to Articles of Incorporation of Skyywalker Records, Inc. be Adopted", pursuant to Florida Statutes Section 607.181(3) on the 20th day of June, 1990.

3. This Amendment is effective upon the Secretary of State's office approval of this amendment.

IN WITNESS WHEREOF, the undersigned President and Secretary of this corporation have executed these Articles of Amendment, this 20th day of, June 1990.

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s/ Luther Campbell
Luther Campbell, President and
Secretary of Skyywalker Records,
Inc.

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SKYYWALKER RECORDS, INC.
WRITTEN STATEMENT MANIFESTING INTENTION THAT AMENDMENT
TO
ARTICLES OF INCORPORATION BE ADOPTED
ADOPTED ON JUNE 20, 1990

The undersigned, being the sole Director and Shareholder of the above-named Florida corporation, eligible to vote, hereby declares, pursuant to Florida Statutes Section 607.181(3), his intention that the following amendment to the Articles of Incorporation be and is adopted:

Article I is hereby amended to read as follows:

The name of this corporation shall be:

"Luke Records, Inc."

IN WITNESS WHEREOF, the undersigned sole Director and Shareholder of this corporation has executed this Statement Manifesting Intention that Amendment to Articles of Incorporation of Skyywalker Records, Inc. be adopted this 20th day of June, 1990.

s/ Luther Campbell
Luther Campbell, Sole Director
and Sole Shareholder

JW/sgs
Lukerec. smt

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STATE OF FLORIDA
COUNTY OF DADE

The foregoing Articles of Amendment of Skyywalker Records, Inc. were acknowledged before me this 20th day of June, 1990 by Luther Campbell, President and Secretary of Skyywalker Records, Inc. a Florida corporation, on behalf of the corporation.

[stamped]
Notary Public State of Florida

My Commission Expires:

[stamped]
Notary Public State of Florida
My Commission Expires Oct. 9, 1992
Bonded Thru Bankers Ins. Ca.

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EXHIBIT E

KING & BALLOW
LAW OFFICES
1200 NOEL PLACE
200 FOURTH AVENUE, NORTH
NASHVILLE, TENNESSEE 37219
TELEPHONE: 615/259-3456
TELECOPY: 615/254-7907

September 25, 1990

HAND DELIVERED

Alan Turk, Esq.
3310 West End Avenue
Nashville, Tennessee 37203

Re: *Acuff-Rose v. Luther Campbell, et al.*

Dear Alan:

We received Defendants' Response to Plaintiff's First Request for Production of Documents in the referenced lawsuit on Friday, September 14, 1990. Quite frankly, we were disappointed.

On review, we determined that Defendants have produced a total of 14 pages, which represent documents for only nine of the 85 requests for production. In addition to the scant responses to Acuff-Rose's requests, Defendants have interposed objections that either have been waived or are inapplicable.

As an initial matter, all of Defendants' responses to Acuff-

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Rose's requests, which were served with the Complaint, were untimely. Because Defendants have failed to timely respond to Acuff-Rose's requests, they have waived the right to object. Please produce all documents responsive to any request where an objection has been interposed. Specifically, please produce documents responsive to requests 1, 37, 38, 81, 82, 83, 84, and 85. In addition, Defendants have not produced documents containing unprivileged information. Both the rules and the clear instructions in part II, B, 1-8 of the request require production of this information.

In addition to waiver of any attorney-client privilege because of untimeliness, Defendants' reliance on advice of legal counsel in Luther Campbell's affidavit attached to the Motion to Dismiss exposes, as a matter of law, all information based on the parody defense arising out of the attorney-client relationship to discovery. Plaintiff is entitled to the information responsive to requests 1, 37, and 38.

These untimely objections also make blanket assertions of the work product doctrine, which has either been waived or is inapplicable or both. For example, Luther Campbell's waiver of the attorney-client privilege also waives any claim of work product protection. In addition, Defendants are not entitled to rely on the attorney work product doctrine to protect information arising out of the review of "Pretty Woman" by someone acting as a musicologist. *See* requests 37 & 38. Accordingly, Acuff-Rose is entitled to production of any and all documents relating to such review.

Further, Defendants assert that materials related to *As Clean As They Wanna Be* are irrelevant. Documents pertaining to the album that contained the infringing work are clearly relevant to this action.

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Defendants deny production of some 34 of Acuff-Rose's requests for documents on the ground that no responsive documents exist. The fact that Defendants have produced documents relating to "Oh, Pretty Woman" is inconsistent with the claim that there are no documents responsible to requests 2, 12, 14, 15, & 21. Another inconsistency is the response to request 6, which says there was no source material for "Pretty Woman," even though Defendants claim that the song is a "parody." By definition, parodies have sources.

In addition to these obvious inconsistencies, Defendants have asserted that no responsive documents exist relating to promotional material prepared for *As Clean as They Wanna Be* (13). It is inconceivable that an album was marketed with no documents relating to the music and lyrics (17, 18, & 33), relating to Defendants' ownership of "Pretty Woman" (20), relating to copyright registration (21), and relating to public performances of the song (31).

Another insufficiency is evident where Defendants offer to produce documents that were in fact not provided. If there are additional documents to be produced, please produce them immediately. If, on the other hand, you assert that all responsive documents have been produced, we note that the responses to requests 5, 26, 29, & 30 state that Defendants will produce the documents, but documents responsive to these requests were not provided. These documents should be produced.

Finally, Florida statute § 607.357 requires corporations to file annual reports. Pursuant to Request 61, Acuff-Rose is entitled to production of these documents.

The foregoing examples are merely illustrative rather than

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exhaustive and show that Defendants' responses to Acuff-Rose's request for production are inadequate and that Defendants remain obligated to respond fully and completely. Toward this end, we will be willing to work with you to set a time to complete Defendants' responses. Please call us to discuss this matter. It has been 49 days since discovery was due. Prompt completion of discovery is necessary to expedite the progress of this lawsuit.

Sincerely,
s/ Betty
Elizabeth B. Marney

EBM/tt

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EXHIBIT F

ALAN MARK TURK ATTORNEY, P.C.
3310 WEST END AVE.
FOURTH FLOOR
NASHVILLE, TENNESSEE 37203

FAXPHONE

October 19, 1990

Elizabeth B. Marney
KING & BALLOW
1200 Noel Place
200 Fourth Avenue, North
Nashville, TN 37219

Re: *Acuff-Rose v. The 2 Live Crew, et al.*

Dear Elizabeth:

Please be advised that I am mailing to you today the proposed Scheduling Order signed by myself on behalf of Alan Jacobi and Sanford Ross. I anticipated that the defendants would also require two days for trial. In addition, please be advised that the defendants agree that this matter should not be submitted to a Magistrate.

Further, please be advised that the defendants, at this time, do not intend to supplement their document production. If you feel it necessary, then I suggest that you file Motion to Compel.

If you have any questions concerning the proposed Pre-Trial Order or the defendants' position concerning your request for a supplemental production please do not hesitate to contact me.

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Very truly yours,
s/Alan
ALAN MARK TURK

AMT/wb

Enclosure

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EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 052
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

AFFIDAVIT

STATE OF FLORIDA)
COUNTY OF DADE)

PART I

COMES NOW the Affiant and makes oath as follows:

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1. My name is Luther Campbell, and I am a citizen and resident of the State of Florida. I am over the age of eighteen (18) years of age.

2. In May, 1989, I wrote a parody of the song "Oh Pretty Woman" which I entitled "Pretty Woman". In writing the parody I felt it was necessary for the listener to identify the parody version with the original version written and performed by the late Roy Orbison. In writing the lyrics to the parody and selecting the accompanying *score* it was a critical factor that I determine what amount of the original work would be included in the parody. I chose to include the distinctive introduction of the original version of "Oh, Pretty Woman" and the first line of lyrics because I felt this was sufficient for the listeners to identify the parody with the original work.

3. The parody "Pretty Woman" was an attempt on my part, through comical lyrics, to satirize the original work "Oh, Pretty Woman", written and performed by Mr. Orbison.

PART II

1. On July 5, 1989, Linda Fine, General Manager of Luke Records f/k/a Luke Skyywalker Records, wrote Gerry [Gary]. Teifer of Opryland U.S.A., Inc., and Acuff-Rose Music, Inc. Attached as Exhibit A to my Affidavit is a copy of that correspondence. The purpose of Ms. Fine's letter was to advise Acuff-Rose Music, Inc. of the intent of The 2 Live Crew to write and perform a parody of the song "Oh, Pretty Woman" originally written and performed by Roy Orbison, for which Acuff-Rose Music, Inc. held the copyright. Ms. Fine enclosed with her correspondence "a copy of the lyrics, so that you may see their satirical parody, very similar in vein to what Wierd Al Yankovic

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and other satirical artists are doing". (Exhibit A) Ms. Fine indicated that Acuff-Rose Music, Inc. would be acknowledge as the owner of the song and that the Defendants would pay the statutory rate for its use. Ms. Fine also indicated that the parody would be included on a novelty record and that it would be "heard by hundreds of thousands of new listeners in their homes". (Exhibit A)

2. On July 17, 1989, Gerry Teifer, of the Opryland Music Group, Inc. and Acuff-Rose, Music, Inc., wrote Linda Fine, General Manager of Luke Records, formerly known as Luke Skyywalker Records. Attached as Exhibit B is a copy of that correspondence. Mr. Teifer, as agent for the Plaintiff, indicated that "I must inform you that we cannot permit the use of a parody of "Oh Pretty Woman". (Exhibit B)

4. In June, 1989, Luke Records, formerly known as Skyywalker Records, released "As Clean As They Want to Be" which included "Pretty Woman" the parody of "Oh Pretty Woman" referenced in Ms. Fine's correspondence attached hereto as Exhibit A.

5. The Defendants did acknowledge Acuff-Rose Music, Inc.'s ownership interest in the song and the authorship of Mr. Orbison and Mr. Dees. Attached as Exhibit C is a photocopy of the compact disc cover which acknowledges these rights of the Plaintiff. "As Clean As They Want To Be" had moderate success in the market place, with combined sales of 248,000 units of albums, cassettes and compact discs. The Plaintiff, as the copyright owner of "Oh Pretty Woman" is entitled to be compensated the statutory rate for the combined sales of albums, cassettes and compact discs. An accounting has been performed by Luke Records, formerly known as Luke Skyywalker Records, to determine the amount of

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money owed to the Plaintiff. This amount is $13,867.56. Attached as Exhibit D to my affidavit is a photocopy of a check made payable to the Plaintiff in the amount of $13,867.56 to compensate the Plaintiff for the combined sales of "As Clean As They Want To Be" for the inclusion of the parody "Pretty Woman". This check has been tendered to the Plaintiff through the United States District Court for the Middle District of Tennessee as was originally offered in Ms. Fine's correspondence dated July 5, 1989 (Exhibit A).

6. That all correspondence referenced above was sent to my legal counsel, Allen L. Jacobi who advised me that since the song was a parody that it could be released if so desired.

Further the Affiant sayeth not.

s/Luther Campbell
LUTHER CAMPBELL

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 31 DAY OF JULY, 1990.

s/Melanie I. Kerr
NOTARY PUBLIC, State of Florida

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EXHIBIT H

§ 607.354 CORPORATIONS & BUSINESS TRUSTS Title 34

Note 10

nonqualified corporation, its successors or assigns. Tornado Southern, Inc. v. Harry's Auto Parts, Inc., App., 222 So.2d 29 (1969).

Bankruptcy trustee acquires title to estate by operation of law, and is not a "successor or assign" within former § 613.04 prohibiting suit by successor or assign of nonqualified foreign corporation. Id.

II. Pleading

The defense raising question of foreign corporation's right to maintain a suit in the state should be specifically made. Ronnoc Grove Co. v. Coe-Mortimer Co., 83 Fla. 370, 91 So. 265 (1922); Farrell v. Forest Inv. Co., 73 Fla. 191, 74 So. 216, 1 A.L.R. 25 (1917).

Under federal rule relating to pleading of affirmance defenses, failure to comply with § 613.04 (see, now, this section) must be affirmatively pleaded. Norman M. Morris Corp. v. Weinstein, C.A., 466 F.2d 137 (1972).

Mere allegation that citizen of Florida assigned mortgage to foreign corporation which failed to file copy of charter in state was insufficient to show corporation's disqualification to maintain foreclosure suit. McMullen v. Inland Realty Corporation, 113 Fla. 476, 152 So. 740 (1934).

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Compliance with the provisions of predecessor to this section is not a condition precedent to the right of a corporation to maintain an action in the courts of this state, but the defense of failure to comply is one that should be specially pleaded. O'Daniel v. Kulosa, 97 Fla. 269, 120 So. 357 (1929).

Plea that plaintiff had not complied with Florida foreign corporation law was demurrable, where it did not aver that plaintiff was not doing business in state when the statute was enacted. Holder Turpentine Co. v. M.C. Kiser Co., 68 Fla. 312, 67 So. 85 (1915).

12. Mandamus

Verification of petition and proof of compliance with § 613.04 (see, now, this section) as to right to do business within the state were sufficient to show right of plaintiffs to bring petition for mandamus. City of Miami Beach v. Jonathon Corp., App., 238 So.2d 516 (1970).

13. Review

Error, if any, in entering judgment in bar against foreign corporation which sued on note executed in state, rather than judgment abating action until corporation should comply with this section, was invited, where corporation's counsel prepared judgment order, hence corporation could not take advantage thereof. Reliance Fertilizer Co. v. Davis, 124 Fla. 859, 169 So. 579 (1936).

607.357 Annual report of domestic and foreign corporations

(1) Each domestic corporation and each foreign corporation

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authorized to transact business in this state shall file with the Department of State, on or after January 1 and on or before July 1 of each year, a sworn report on such forms as the Department of State shall prescribe setting forth:

(a) The name of the corporation and the state or country of incorporation.

(b) The date of incorporation or, if a foreign corporation, the date on which it was admitted to do business in this state.

(c) The street address of the principal office of the corporation.

(d) The corporation's federal employer identification number.

(e) The name and street address of each officer.

(f) The name and mailing address of each director.

(g) The name and street address of the registered agent upon whom service of process may be made.

(h) Such additional information as may be necessary or appropriate to enable the Department of State to carry out the provisions of this chapter.

(2) Proof to the satisfaction of the Department of State that on or before July 1 such report was deposited in the United States mail in a sealed envelope, properly addressed with postage prepaid, shall be deemed a compliance with this requirement.

(3) If the Department of State finds that such report conforms to the requirements of this chapter, it shall file the same. If the Department of State finds that such report does not so conform, it shall promptly return the same to the corporation for any necessary corrections, in which event the penalties hereinafter prescribed for failure to file such report within the time hereinabove provided shall not apply if such report is corrected to conform with the requirement of this chapter and returned to the Department of State within 30 days from the date on which it was mailed to the corporation by the Department of State.

(4) Each report shall be executed by the corporation by its president, vice president, secretary, assistant secretary, or treasurer or, if the corporation is in the hands of a receiver or trustee, it shall be executed on behalf of the corporation by such receiver or trustee, and the signing thereof shall have the same legal effect as if made under oath, without the necessity of appending such oath thereto.

(5) The information required to be shown on each annual report shall be determined as of December 31 immediately preceding the annual report due date.

(6) Any corporation failing to file the annual report required by this section shall not be permitted to maintain or defend any action in any court of this state until such report is filed and all taxes due under this chapter are paid, and any corporation failing to file the annual report shall be subject to dissolution or cancellation of its certificate of authority to do business as provided in this chapter.

APPENDIX O — DEFENDANTS' RESPONSE TO THE PLAINTIFF'S MOTION TO COMPEL FILED JANUARY 16, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO: 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a THE 2 LIVE CREW

and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO THE PLAINTIFF'S MOTION TO COMPEL

Comes now the Defendants, by and through their attorneys, and in response to the Plaintiff's Motion to Compel would state that the Plaintiff's Motion to Compel has been rendered moot by the Court's Order of January 14, 1991. This Court has granted the

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Defendants' Motion for Summary Judgment in accordance with Rule 56 of the Federal Rules of Civil Procedure. The Court has held that the Defendants' song "Pretty Woman" is a parody of the Plaintiff's song "Oh, Pretty Woman" and that said parody constitutes fair use under Section 107 of the Copyright Act. The Court has further held that Section 106 of the copyright Act, as a matter of law, precludes the tort claims alleged by the Plaintiff. The Court in its Memorandum Opinion did not address whether or not the funds deposited by the Defendants satisfy their statutory obligation to the Plaintiff.

The Defendants have provided to the Plaintiff documents evidencing the number of copies of *As Clean As They Wanna Be* that were sold. The Defendants have deposited with the Court sufficient funds to satisfy their statutory obligation to the Plaintiff. The Court's Order of January 14, 1991, renders the Plaintiff's Motion to Compel moot.

Respectfully submitted,
s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 17th day of January, 1991.

s/Alan Mark Turk
ALAN MARK TURK

APPENDIX P — MEMORANDUM OPINION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVIS HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

MEMORANDUM

This case involves a claim by Acuff-Rose Music, Inc. ("Acuff-Rose") for copyright infringement of its song, "Oh, Pretty Woman." Acuff-Rose has named as defendants the members of the rap group 2 Live Crew and Luke Skyywalker Records. The plaintiff contends that the defendants unfairly are trying to cash in on the popularity of "Oh, Pretty Woman."

For the reasons stated below, the Court finds that no genuine issue of material fact exists regarding the allegation of copyright infringement. This claim is dismissed pursuant to Fed. R. Civ. P. 56. The plaintiff's pendent tort claims are preempted by 17 U.S.C. § 301.

Appendix P

I.

This copyright case involves Roy Orbison's musical hit "Oh, Pretty Woman" as recorded by 2 Live Crew. Roy Orbison and William Dees co-authored "Oh, Pretty Woman" in 1964 and assigned their rights in the song to Acuff-Rose Music the same year. "Oh, Pretty Woman" was copyrighted by Acuff-Rose in 1964. Since then the song has continued to generate profits for Acuff-Rose.

On July 5, 1989, 2 Live Crew's manager, Linda Fine, wrote Gary Teifer of Opryland U.S.A., Inc. and Acuff-Rose. Fine informed Teifer that 2 Live Crew was going to parody "Oh, Pretty Woman," that Orbison and Dees would receive full credit as owners and authors, and that 2 Live Crew would pay Acuff-Rose the statutorily required rate for use of the song. Teifer responded on July 17, denying the license request and informing Fine that "we cannot permit the use of a parody of 'Oh, Pretty Woman.' "

On July 15, 1989, 2 Live Crew released its version of "Oh, Pretty Woman" on record albums, tapes and compact discs, entitled "As Clean As They Wanna Be." The release, called "Pretty Woman," is on side B, sandwiched between "Me So Horny" and "My Seven Bizzos." Both the compact disc cover and compact disc itself acknowledge Orbison and Dees as the authors of "Oh, Pretty Woman" and Acuff-Rose as the publisher.

Almost one year later, on June 18, 1990, Acuff-Rose sued 2 Live Crew and their record company, Luke Skyywalker Records, for copyright infringement, interference with business relations, and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman." Acuff-Rose contends that the lyrics of "Oh, Pretty Woman" as sung by 2 Live Crew "are not consistent with good taste or would

disparage the future value of the copyright." Moreover, Acuff-Rose charges that 2 Live Crew's music is substantially similar in melody to "Oh, Pretty Woman" and the lyrics of the first verse are substantially similar to that of the original version. In response, defendants have moved for summary judgment. They argue that "Pretty Woman" is a parody that constitutes fair use under 17 U.S.C. § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). They also argue that the two tort claims are preempted by 17 U.S.C. § 301. Pursuant to Fed. R. Civ. P. 67, 2 Live Crew has deposited with the Court the $13,867 it maintains is due to Acuff-Rose for use of its song as required by the Copyright Act. This decision does not address whether that sum reflects adequate compliance with the Act.

The resolution of this motion presents two questions for the Court to address: first, whether "Pretty Woman" constitutes fair use of copyrighted material pursuant to 17 U.S.C. § 107; and second, whether the plaintiff's state law claims are preempted by federal copyright law.

II.

A. Standard of review

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Id.* at 324.

The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that a dispute about a material fact is "genuine" within the meaning of Fed. R. Civ. P. 56 only if "the evidence is such that a responsible jury could return a verdict for the nonmoving party." 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Id.* at 252. Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. *Id.* at 255.

B. Fair Use

To foster the widespread dissemination of ideas, the copyright system is "designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546 (1985). *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (purpose of copyright is to create incentives for creative effort). Notwithstanding the monopoly granted to the owner, fair use has been defined as the "privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent." *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)).

Section 107 of the Copyright Act instructs courts to balance the following four factors:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

> (1) the purpose and character of the use, including whether such use is a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

At a minimum, courts have indicated that evaluation of these four factors is required. But they are not exclusive. *Harper & Row*, 471 U.S. at 560; *Pacific & Southern v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

Before the court may move to the merits of the statutory fair use analysis, it must consider whether this case is suitable for summary judgment. Plaintiffs allege that a number of material issues of fact remain. "Fair use is a mixed question of law and fact." *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & Southern Co.*, 744 F.2d at 1495 n. 8). "Where the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyright work.' " *Id.* Based on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits, whether defendant's parody constitutes fair use under 17 U.S.C. § 107 is a question of law for the Court to determine. *See Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) (although discovery not commenced, since "parties dispute only the ultimate conclusions to be drawn from the admitted facts . . . we can make them without usurping the function of the jury").

Since no genuine material issues of fact remain, the Court will proceed to address the four factors cited by § 107.[1]

1. *Purpose and Character of the Use.* The first factor the Court must consider is the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. As examples of fair use, the preamble of § 107 lists "criticism, comment, news reporting, teaching . . . scholarship, [and] . . . research." 17 U.S.C. § 107. Congress has listed parody as one of those activities that might qualify for the fair use exception. *See* H.R. Rep No. 1476, 94th Cong., 2d Sess., 65 (1976), *reprinted in* 1976 U.S. Code Cong. Admin. News 5680. Obviously, 2 Live Crew's song is included on a commercially distributed record album sold for the purpose of making a profit.

Although 2 Live Crew's primary goal in releasing "As Nasty As They Wanna Be" is to sell its music, that finding "does not necessarily negate a fair use determination. . . ." 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-70 (1990). In *Harper & Row*, the Court stated that a commercial purpose merely "tends to weigh against a finding of fair use." *Harper & Row*, 471 U.S. at 562. "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.*

Importantly for the purposes of this case, it is plain that 2 Live

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1. No published Sixth Circuit opinion addresses this type of copyright infringement question. *Compare Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (per curiam) (unpublished text in Westlaw). Accordingly, this Court relies on opinions from other circuits, notably the Second and Ninth Circuits.

Crew also desired to parody the original version of "Oh, Pretty Woman."[2] In copyright law, courts have long recognized that satirical expression is "deserving of substantial freedom — both as entertainment and as a form of social and literary criticism." *Berlin v. E.C. Publication, Inc.*, 329 F.2d 541, 545 (2nd Cir.), *cert. denied*, 379 U.S. 822 (1964). Including parody within the fair use doctrine has been recognized as "a means of fostering the creativity protected by the copyright law." *Warner Bros., Inc. v. American Broadcasting Companies*, 720 F.2d 231, 242 (2d Cir. 1983).

Many parodies "distributed commercially may be 'more in the nature of an editorial or social commentary than . . . an attempt to capitalize financially on the plaintiff's original work.' " *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (quoting *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981)); *Cf. Original Appalachian Artworks v. Topps Chewing Gum*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) (holding that primary purpose behind defendant's parody "is not an effort to make a social comment but is an attempt to make money"). As discussed in Section II.B.4, *infra*, the defendant may rebut the presumption of commercial use as described in *Harper & Row* by convincing the court that the parody does not unfairly diminish the economic value of the original. *Fisher*, 794 F.2d at 437.

Acuff-Rose argues that the song is not a parody. It contends

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2 *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366, 376 (S.D.N.Y.), *aff'd*, 604 F.2d 200 (2d Cir. 1979), defines parody as "a work in which the language or style of another work is closely imitated or mimicked for comic effect or riducule." *See* Dorson, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs*, 65 B.U.L. Rev. 923, 924 (1985) (Parody "is a potent form of social commentary which attempts to expose the foibles and follies of society in direct, biting, critical, and often harsh language — tempered by humor.").

that the 2 Live Crew's version does not comment on the copyrighted work because the former is "primarily about the physical attributes of women" and the latter is "primarily about loneliness."

But based on a comparison of the two songs and the affidavits provided to the Court, it is apparent that 2 Live Crew has created a comic parody of "Oh, Pretty Woman."[3] The theme, content and style of the new version are different than the original. In his affidavit, Luther Campbell, also known as Luke Skyywalker, states that his version of "Oh, Pretty Woman" was written as a parody designed "through comic lyrics, to satirize the original work. . . ." He acknowledges that he purposefully copied selected music and lyrics from "Oh, Pretty Woman" as a device to help listeners identify the parody with the original version. Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody.

2 Live Crew's lyrics provide the strongest evidence of its attempt to parody "Oh, Pretty Woman." Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones.[4] The first lyrical hint that something is amis comes when a

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3 Gerry Teifer's comment in his July 17, 1990 letter to 2 Live Crew that the new version of "Oh, Pretty Woman" is a parody does not necessarily equate with the specific legal definition of parody. Teifer says in his affidavit that he never heard the 2 Live Crew version prior to denying their licensing request.

4 It is unclear exactly what Acuff-Rose means when it complains in its response to the Motion for Summary Judgment that the parody "dirt[ies]" the copyright. 2 Live Crew's version is neither obscene nor pornographic. Even if the work included pornographic references, that does not necessarily preclude a finding of fair use. *Pillsbury Co. v. Milky Way Productions, Inc.* 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

loud, barking laugh immediately follows the first two words of the parody, "pretty woman." (Laughter follows later in the song too.) The purpose of the laughter is soon explained as the ensuing choruses respectively depict a big, hairy woman, a bald-headed woman, and a "two-timin' " woman. Roy Orbison's pretty woman becomes akin to "Cousin It," the ugly, bit character featured on the TV series "The Addams Family." The physical attributes of the subject woman deviate from a pleasing image of feminity to bald-headed, hairy and generally repugnant. To complete the thematic twist, at the end of the parody the "two-timin' " woman turns out to be pregnant. The phrase, "the baby ain't mine" is completely inconsistent with the tone and story of the romantic original. In sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them. *See MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981) (noting that "if the copyrighted [work] is not at least in part an object of the parody, there is no need to conjure it up"); Defendant's Affidavits of Oscar Brand and William Krasilovsky.

The parody also employs a number of musical devices that exaggerate the original and help to create a comic effect. 2 Live Crew uses the same drum beat and bass riff to start its song. But unlike the original, only five seconds into the song and immediately following the bass riff, 2 Live Crew inserts a heavily distorted "scraper," indicating a significant disparity in style. The same scraper is used four seconds later to reiterate that message and subsequently at the end of the song as well. Also at the beginning of the parody, the first soloist sings in a different key than the chorus. In addition, four times during the parody, 2 Live Crew repeats Orbison's bass riff over and over again, double the number of times on the original, until the riff begins to sound like annoying scratch on a record.

Although the Court has determined that 2 Live Crew's version parodies the original, a finding of a parody does not necessarily equate with a finding of fair use. *Fisher*, 794 F.2d at 435. "Parody was not classified as a presumptively fair use . . . . Each assertion of the 'parody defense' must be considered individually, in light of the statutory facts, reason, experience, and of course, the general principles developed in past cases." *Id.* As a result, the Court will examine the remaining three statutory elements of § 107.

2. *Nature of the Copyrighted Work.* The second factor is the nature of the copyrighted work. In addressing this element, "the court may consider, among other things, whether the work was creative, imaginative, and original, . . . and whether it represented a substantial investment of time and labor made in anticipation of financial return." *MCA*, 677 F.2d at 182 (citation omitted). *See also Harper & Row*, 471 U.S. at 563; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-78. Since "Oh, Pretty Woman" is a published work, with creative roots, this factor weighs in favor of the plaintiff.

3. *Amount of Quotation.* The third factor to address is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This element contains quantitative and qualitative elements and as a result the amount of protected material that a copier may take under the rubric of fair use will vary from case to case.

For instance, fair use may not allow a person to copy the most qualitatively "valuable" portion of the work, even if such portion constitutes a relatively small amount of the entire protected material. *See, e.g., Harper & Row*, 471 U.S. at 565-66. In *Harper & Row* the Supreme Court noted that a taking that is "insubstantial with respect to the infringing work" does not necessarily mean that

fair use applies. *Id.*, 471 U.S. at 565. By contrast, "the copying of an entire work does not preclude fair use *per se.*" *Hustler Magazine, Inc., v. Moral Majority Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

Acuff-Rose argues that the portions taken from "Oh, Pretty Woman" are both qualitatively and quantitatively significant. According to the plaintiff's musicologist, Earl V. Spielman, the two works are substantially similar. The copying includes the name of the song and key lyrics. The 2 Live Crew version also includes the same guitar refrain, opening drum beat and melody and chorus. Affidavit of Earl V. Spielman. Since the original song is so popular, Acuff-Rose contends that 2 Live Crew does not need to copy much of the original in order to conjure up its memory.

But the conclusions drawn by the plaintiffs does not address whether 2 Live Crew used more of the copyrighted work than was necessary to recall or conjure up "Oh, Pretty Woman." *See, e.g., Fisher,* 794 F.2d at 438 n.4 (holding that affidavits conflicting on question of substantiality are irrelevant given that issue of extent of taking is a question of law). No one disputes that 2 Live Crew copied "Oh, Pretty Woman." But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used.

It is a settled aspect of copyright law that parodists have the right to conjure up the object of the parody. In *Berlin*, 329 F.2d 541, the court stated that where "the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper." *Id.* at 545. *See Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252,

253 (2d Cir. 1980) ("parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point"). Indeed, the effectiveness of a parody inherently depends on its ability to copy the original work.

Several courts that have balanced the conflict between the rights of the copyright owner against the goals of the parodist have concluded that parodies of songs require more leeway than other types of parodies. The Ninth Circuit reasoned in *Fisher* that resolution of the substantiality question depends on the medium of the respective works. In *Fisher,* the plaintiffs sued for copyright infringement of a song entitled "When Sunny Gets Blue." As in this case, the plaintiffs previously had denied defendant Dees' request to record a parody of the original. Nonetheless, Dees released his parody song "When Sonny Sniffs Glue," copying the musical theme of the original while changing the lyrics. *Id.* at 434. The *Fisher* court observed that:

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy," provides some license for "closer" parody. . . . To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in this original expression."

Fisher, 794 F.2d at 439 (citations omitted). Likewise, in *Berlin*, the Second Circuit affirmed the application of the fair use defense in a case where the defendants, publishers of "Mad Magazine," had

published a volume which parodied twenty-five of the plaintiff's song lyrics in same meter. "The disparaties in theme, content and style between the original lyrics and the alleged infringements could hardly be greater." *Berlin*, 329 F.2d at 545. *Cf. Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (holding that fair use defense cannot apply where the copying is virtually complete or almost verbatim and that parodist may only use what is necessary to conjure up the original), *cert. denied*, 439 U.S. 1132 (1979); *MCA*, 677 F.2d at 185 (holding that where defendant's song "Cunnilingus Champion of Co. C" did not parody plaintiff's song "Boogie Woogie Bugle Boy of Company B," the amount copied by defendants from the original song was so substantial as to be unfairly excessive).

In this case, 2 Live Crew has not mimicked so much of "Oh, Pretty Woman" that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439.

4. *Effect on the Market.* Finally, as discussed in the first statutory factor under § 107, the Court must examine the effect of the use upon the potential market for or value of the copyrighted work. The Supreme Court has referred to the fourth factor as "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. *Accord Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175 (5th Cir. 1980).

The Supreme Court reasoned that this element should be weighed most heavily since "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create." *Sony Corp.*, 464 U.S. at 450. As a result, fair use, "when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row*, 471 U.S. at 566-67 (quoting 1 Nimmer, *Nimmer on Copyright*, § 1.10[D] at 1-87). The Court emphasized that to deny a finding of fair use, one need show only that if the defendant's use " 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.' " *Harper & Row*, 471 U.S. at 568 (quoting *Sony Corp.*, 464 U.S. at 451).

Neither *Harper & Row* nor *Sony* involved a parody. But in *Fisher*, which involved a copyright infringement claim and a parody defense, and the Ninth Circuit held that the parody "When Sonny Sniffs Glue" had no cognizable economic impact on the original song, "When Sunny Gets Blue." It concluded that commercial substitution was unlikely, remarking that:

> "When Sunny Get Blue" is a "lyrical song concerning or relating to a woman's feelings about lost love and her chance for .... happiness again." By contrast, the parody is a 29-second recording concerning a woman who sniffs glue, which "ends with noise and laughter mixed into the song." We do not believe that consumers desirous of hearing a romantic and nostalgic ballad such the composers' song would be satisfied to purchase the parody instead.

> Nor are those fond of parody likely to consider "When Sunny Gets Blue" a source of satisfaction. The two works do not fulfill the same demand.

Fisher, 794 F.2d at 438. *See also, Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983) ("Where the copy does not compete in any way with the original . . . concern is absent."), *cert. denied*, 469 U.S. 823 (1984); *Elsmere Music*, 482 F. Supp. 741, 746-47 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (although defendants appropriated the heart of plaintiff's song, since the copying was a parody it could not fulfill demand for the original version). *Cf. New Line Cinema Corp. v. Bertlesman Music Group*, 693 F. Supp. 1517, 1528 (S.D.N.Y. 1988) (parody defense rejected where defendant's rap video would be likely to harm the value of carefully planned derivative use of plaintiff's movie in the rap video market).

With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher*, it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendant's Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983), it has not produced convincing evidence that any harm to any existing or potential market has occured. *Cf. Harper & Row*, 471 U.S. at 567 (where

trial court found an actual effect on the market). On a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324. Acuff-Rose must adduce more than a scintilla of evidence to overcome the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Plaintiffs attempt to focus on their possible future losses and mount two different arguments. First, they contend that 2 Live Crew's parody prevents them from marketing future derivative works, such as a rap version or even their own "burlesque" of the Orbison original. Second, they argue that "Oh, Pretty Woman" "has been tarnished by being associated with these lyrics and with 2 Live Crew" and that will result in the loss of future licensing arrangements.

Since 2 Live Crew's version of "Oh, Pretty Woman" is a parody, that release has not prevented Acuff-Rose from recording whatever version of the original it desires. Likewise, plaintiff's argument that it would be prevented from releasing a parody of their work is meritless. In a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author. *See* 3 Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90.12; *Fisher*, 794 F.2d at 437 ("Parodists will seldom get permission from those whose works are parodied. . . . The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought.")

Examining the latter argument, several courts have discounted attempts by copyright holders to claim infringement based on the impact of alleged criticism. "In assessing the

economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, a 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically'. . . . Biting criticism suppresses demand; copyright infringement usurps it." *Fisher*, 794 F.2d at 437-38 (citations omitted). *Also see Consumers Union*, 724 F.2d at 1050-51; *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981).

III.

Having applied § 107's four factor, the Court finds that they weigh in favor of the defendants. 2 Live Crew's "Pretty Woman" is a parody. Its purpose is to poke fun at the original version of "Oh, Pretty Woman." In so doing, the parody copies from the original. Notwithstanding the copying needed to conjure up the original song, for the foregoing reasons the Court concludes that 2 Live Crew's use of the original copyrighted song is protected fair use.

IV.

Defendants also argue that plaintiff's state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by § 301 of the Copyright Act. 17 U.S.C. § 301 describes the extent to which the Copyright Act preempts state law causes of action based on copyright. It provides in pertinent part:

> (a) On and after January 1, 1978 all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of

> copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.
>
> (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to —
>
> (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

A two-part test determines when § 301(a) preempts at common law tort claim. "First, the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in [17 U.S.C. § 102]. Second, the right must be equivalent to any of the rights specified in [17 U.S.C. § 106]." *Baltimore Orioles v. Major League Baseball Players Assn.*, 805 F.2d 663, 674 (7th Cir. 1986), *cert. denied*, 480 U.S. 941 (1987). *See also Harper & Row Publishers, Inc., v. National Enterprises*, 723 F.2d 195, 199-200 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985).

In this case, Acuff-Rose focuses on the second factor of the § 301 analysis. It argues that the tort claim is not "equivalent to "

the rights set forth in § 106. A right under state law is equivalent if it creates or destroys any of the rights contained in Copyright Act. *Id.* at 676; *Allied Artists Pictures Corp. v. Rhodes*, 679 F.2d 656, 662-63 (6th Cir.), *aff'g in pertinent part*, 496 F. Supp. 404, 443-44 (S.D. Ohio 1980). Section 106 of the Copyright Act grants plaintiffs the exclusive right to reproduce, distribute, perform and display the copyrighted work, "Oh, Pretty Woman."[5]

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5. Section 106 of the Copyright Act provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
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> (1) to reproduce the copyright work in copies or phonorecords;
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> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, or choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyright work publicly.

With respect to Acuff-Rose's claim for interference with business relationships, Tennessee common law provides that "[O]ne's business is entitled to protection 'from tortious interference by a third person who, in interfering therewith, is not acting in the exercise of some right, such as the right to compete for business.' " *Lann v. Third National Bank*, 198 Tenn. 70, 72, 277 S.W.2d 439, 440 (1955). To prevail on such a claim, the plaintiff must show malice, ill will, or wrongful motive. *Id. See also Testerman v. Tragesser*, 789 S.W.2d 553, 556-57 (Tenn. App. 1989) (citing *Lann*). Plaintiff alleges that it has lost benefits flowing from its copyright monopoly. Like the copyright infringement claim, violation of the state law claim rests on a finding of unauthorized copying. "In both cases, it is the act of unauthorized publication which causes the violation. The enjoyment of benefits from derivative use is so intimately bound up with the right itself that is could not possibly be deemed a separate element. . . ." *Harper & Row*, 723 F.2d at 201. In addition, the fact that the state law cause of action requires proof of intent does not necessarily preclude a finding of preemption. The Second Circuit concluded in *Harper & Row* that:

> [T]he fact that cross-appellants pleaded additional elements of awareness and intentional interference, not part of a copyright infringement claim goes merely to the scope of the right; it does not establish qualitatively different conduct on the part of the infringing party, nor a fundamental nonequivalence between the state and federal rights implicated.

Id. Since the claim is equivalent to rights established by § 106 the cause of action is preempted by federal law. *See also, Gemcraft Homes, Inc. v. Sumurdy*, 688 F. Supp. 289, 295 (E.D. Tex. 1988) (holding that plaintiff's claim for tortious interference with

contractual relations is preempted by § 301); *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565, 1572-73 (N.D.Ga. 1988) (same); *McNabb Bennett & Associates, Inc. v. Terp Meyers Architects*, No. 85-C-8792, (N.D. Ill. June 19, 1986) (available on Westlaw) (same).

The question about whether § 301 preempts any Tennessee tort for interference with prospective business advantage is trickier. The plaintiff has not cited any Tennessee case in which recovery was allowed for wrongful interference not involving a breach of contract, and it appears that Tennessee has not developed any significant body of law in this area. *Warde v. Kaiser*, 887 F.2d 97, 103 n.1 (6th Cir. 1989) (citing *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859, 874 (M.D. Tenn. 1980) (Wiseman, J.)).

Even assuming arguendo that interference with prospective business advantage constitutes a separate tort under Tennessee law, such a cause of action is nevertheless preempted by federal law. As the Court found for the interference with business relationship claim, this second tort is equivalent to the rights specified in 17 U.S.C. § 106 and thus is preempted by federal law as well. *See e.g, Motown Record Corp. v. George A. Hormel & Co.*, 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (holding that plaintiff's claim for tortious intereference with prospective business advantage is preempted by § 301).

s/ Thomas A. Wiseman
THOMAS A. WISEMAN, JR.
CHIEF JUDGE

APPENDIX Q — ORDER GRANTING PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW and LUKE SKYYWALKER RECORDS

ORDER

For the reasons stated in the accompanying Memorandum, the Motion for Summary Judgment made by defendants 2 Live Crew and Luke Skyywalker Records against plaintiff Acuff-Rose Music, Inc. is granted pursuant to Rule 56 of the Federal Rules of Civil Procedure. 2 Live Crew's rendition of "Pretty Woman" is a parody of the original "Oh, Pretty Woman" that constitutes fair use under 17 U.S.C § 107 of the Copyright Act, 17 U.S.C. §§ 101-914 (1982). *See, e.g., Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986).

The two Tennessee state law claims for interference with business relations and interference with prospective business advantage for the performance and distribution of a copy of "Oh, Pretty Woman" are preempted by 17 U.S.C. § 301.

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IT IS SO ORDERED.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
Chief Judge

APPENDIX R — MOTION FOR ENTRY OF SUPPLEMENTAL ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION FOR ENTRY OF SUPPLEMENTAL ORDER

Comes now the Plaintiff, Acuff-Rose Music, Inc. ("Acuff-Rose"), and moves the Court, pursuant to 28 U.S.C. § 1292(b) and the applicable Federal Rules of Civil Procedure, for a supplemental order certifying for purposes of appeal the Court's January 14, 1991, grant of summary judgment on the issues of fair use and of preemption, since there is no just reason for delay and since such issues constitute controlling questions of law, the

prompt resolution of which will materially advance the ultimate termination of the litigation. In support of its motion, Acuff-Rose would show as follows:

1. Acuff-Rose commenced this action on June 18, 1990.

2. On August 1, 1990, Defendants moved pursuant to Rule 67 of the Federal Rules of Civil Procedure to deposit into the Court the sum of $13,867.56. The Court allowed the deposit to be made by order dated August 24, 1990.

3. The Court's Memorandum and Order entered January 14, 1991, found The 2 Live Crew's rendition of "Pretty Woman" to be a parody that constituted fair use. The Order granted Defendants' motion for summary judgment, denying Acuff-Rose's copyright infringement claims and further holding that the two pendent state law claims for interference with business relations and interference with prospective business advantage were preempted. The Court acknowledged that Defendants had deposited a sum with the Court pursuant to Rule 67 of the Federal Rules of Civil Procedure but reserved the question whether the sum constituted adequate compliance with the Copyright Act in discharging Defendants' obligation to Plaintiff under the Act.

4. By letter dated January 30, 1991, counsel for Defendants forwarded a copy of a royalty statement and represented that according to this statement Defendants owed Acuff-Rose $11,956.49. Counsel for Defendants further noted that this amount was $1,911.07 less than the amount deposited with the Court in August 1990. See attached Exhibit A.

5. As of the date of this Motion, no disposition of the funds deposited pursuant to Rule 67 has been made.

6. On February 11, 1991, Acuff-Rose filed a Notice of Appeal in this action.

7. Because the Court's January 14 Memorandum and Order reserved the question as to the adequacy of the sum deposited with the Court, the January 14, 1991, Order may be less than the full and final judgment required to provide jurisdiction for the Sixth Circuit Court of Appeals. Out of an abundance of caution, Acuff-Rose moves for a supplemental order certifying for purposes of appeal the Court's January 14, 1991, ruling on the issues of fair use and preemption, since there is no just reason for delay, and since such issues constitute controlling questions of law, the prompt resolution of which will materially advance the ultimate termination of the litigation.

8. Further, Acuff-Rose respectfully disagrees with the Court's determination on the controlling issues of law decided on January 14, and therefore submits it is entitled to sums far in excess of those that Defendants concede are due to discharge their obligation to Acuff-Rose under the Copyright Act. Acuff-Rose expressly reserves its position and right to claim additional amounts due and owing in excess of those deposited with the Court in the event its appeal is successful or in further proceedings. As set forth in Mr. Turk's letter of January 30, 1991, Defendants contend that the sum of $11,956.49 will adequately discharge their obligation to Acuff-Rose due under the Copyright Act. While Acuff-Rose does not agree with this contention, there is obviously no dispute that Defendants owe Acuff-Rose at least $11,956.49. Accordingly, Acuff-Rose further moves that the Court enter a separate order directing payment of $11,956.49 to Acuff-Rose and retaining the balance of the $13,867.56 deposited by Defendants pending further proceedings.

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9. In view of these considerations, Acuff-Rose respectfully requests an expedited resolution of this motion.

Respectfully submitted,

KING AND BALLOW

By: s/ E. Andrew Norwood
Alan L. Marx
Elizabeth B. Marney
E. Andrew Norwood
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue North
Nashville, TN 37219
(615) 259-3456

Of Counsel:

Hal L. Willis
Opryland USA, Inc.
2806 Opryland Drive
Nashville, TN 37219

Appendix R

CERTIFICATE OF SERVICE

I hereby certify that on February 13th, 1991, a true and exact copy of the foregoing Motion for Entry of Supplemental Order was served on Defendants by placing a copy of same in the U.S. Mail, postage prepaid thereon, addressed to:

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

Alan M. Turk, Esq.
Sanford R. Ross, Esq.
3310 West End Avenue
Nashville, TN 37203

s/ E. Andrew Norwood
E. Andrew Norwood

APPENDIX S — SUPPLEMENTAL ORDER CERTIFYING INTERLOCUTORY APPEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.,

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx,

_p/k/a
THE 2 LIVE CREW,
and

LUKE SKYYWALKER RECORDS,

Defendants.

SUPPLEMENTAL ORDER

On January 14, 1992, the Court issued a memorandum and an Order which the clerk entered on the Civil docket pursuant to Rules 58 and/or 79(a) of the Federal Rules of Civil Procedure. In that Memorandum and Order the Court held that The 2 Live Crew's rendition of "Pretty Woman" was a parody that constituted a fair use of Plaintiff's copyrighted work, "Oh, Pretty Woman" and that the two pendent state law claims were preempted by 17 U.S.C. § 301. The Court acknowledged that funds had been deposited by

Appendix S

Defendants with the Court pursuant to Rule 67 of the Federal Rules of Civil Procedure, but expressly reserved the question whether that sum was adequate compliance with the Copyright Act in discharging Defendants' obligation to Plaintiff under the Act.

Because the Court reserved its decision as to the adequacy of the sum deposited under Rule 67, the Order of January 14, 1991, is not an order appealable under 28 U.S.C. §§ 1291 and 1292 except pursuant to 28 U.S.C. § 1292(b). In the Court's opinion, the January 14 Order and Memorandum involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order and Memorandum will materially advance the ultimate termination of the litigation. There is no just reason for delay. The Court hereby certifies that such Order should be appealable pursuant to 28 U.S.C. § 1292(b). This Supplemental Order is entered in supplementation and amendment of the Order and Memorandum entered on January 14, 1991.

s/ Thomas A. Wiseman, Jr.
THOMAS A. WISEMAN, JR.
Chief Judge

APPENDIX T — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING INTERLOCUTORY APPEAL

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 91-8507

ACUFF-ROSE MUSIC, INC.,

Petitioner,

v.

LUTHER R. CAMPBELL, also know as Luke Skyywalker; CHRISTOPHER WONGWON, also known as Fresh Kid Ice; MARK ROSS, also known as Brother Marquis; DAVID HOBBS, also known as Mr. Mixx, professionally known as THE TWO LIVE CREW and LUKE SKYYWALKER RECORDS,

Respondents.

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and JOINER, Senior District Judge*.

ORDER

Plaintiff seeks permission under 28 U.S.C. § 1292(b) to appeal an order granting summary judgment to defendants on plaintiff's claims of copyright infringement, interference with business relationships, and interference with prospective business advantages. The order reserved decision on whether certain funds deposited by defendants in the district court with sufficient

---

* The Honorable Charles W. Joiner, Senior District Judge for the Eastern District of Michigan, sitting by designation.

compensation to plaintiff under the Copyright Act. The defendants do not oppose the petition.

To obtain permission to appeal pursuant to 28 U.S.C § 1292(b), the movant must show that: (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for differences of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal would materially advance the ultimate termination of the litigation. *Cardwell v. Chesapeake & Ohio Ry. Company,* 504 F.2d 444, 446 (6th Cir. 1974). Review under § 1292(b) should be sparingly granted and then only in exceptional cases. *Kraus v. Board of County Road Comm'rs,* 364 F.2d 919, 922 (6th Cir. 1966); *In re April 1977 Grand Jury Subpoenas,* 584 F.2d 1366, 1369 (6th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 934 (1979); *see also Lynch v. Johns-Manville Sales Corp.,* 701 F.2d 44 (6th Cir. 1983). Upon review and consideration, we conclude that immediate appeal will not materially advance the ultimate termination of the litigation.

It therefore is ORDERED that the petition for leave to appeal is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green, Jr.
Clerk

APPENDIX U — MOTION FOR DISTRIBUTION OF FUNDS OR PERMISSION TO FILE ADDITIONAL BRIEFS FILED JUNE 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF ACUFF-ROSE'S MOTION FOR DISTRIBUTION OF FUNDS OR PERMISSION TO FILE ADDITIONAL BRIEFS

Comes now the Plaintiff, Acuff-Rose Music, Inc., ("Acuff-Rose") and moves the Court either to distribute in a manner consistent with the Court's January 14, 1991, Memorandum and Order ("January 14 Order") the funds being held by the Clerk of the Court or to direct further briefing of the impact of the Court's Order on the distribution of the funds. In support of this motion, Acuff-Rose states:

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1. On August 24, 1990, the Court ordered that funds, the Defendants represented to be all the funds owed to Acuff-Rose, be deposited with the Clerk of the Court.

2. In the January 14 Order, the Court granted summary judgment to the Defendants but reserved the question of "whether the sum [deposited on August 24] reflects adequate compliance with the [Copyright] Act." January 14 Order at 3.

3. On February 19, 1991, the Court granted a 28 U.S.C. § 1292(b) certification of the January 14 Order.

4. On April 4, 1991, the Sixth Circuit Court of Appeals refused permission to appeal under the certification.

5. Significant legal issues are raised by the January 14 Order and by a distribution of the funds not inconsistent with that Order. The Court would benefit from briefing on those issues.

Therefore, Acuff-Rose moves that the Court either distribute the funds being held or set a briefing schedule so that the parties may address the issues raised.

Respectfully submitted,

KING & BALLOW

BY: s/ Francis J. Del Casino
R. Eddie Wayland
E. Andrew Norwood
Francis J. Del Casino

Appendix U

1200 Noel Place
200 Fourth Avenue North
Nashville, TN 37219

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Of Counsel:

Hal Willis
Opryland USA, Inc.
2806 Opryland Drive
Nashville, TN 3721
Acuff-Rose Music, Inc.

Appendix U

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiff Acuff-Rose's Motion For Distribution of Funds Or Permission To File Additional Briefs was duly served this 10th day of June 1991, by U.S. Mail, postage prepaid addressed as follows:

Alan M. Turk, Esq.
Sanford R. Ross, Esq.
3310 West End Avenue
Fourth Floor
Nashville, Tennessee 37203

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

s/ Francis J. Del Casino
Francis J. Del Casino

APPENDIX V — MOTION TO AMEND COMPLAINT FILED JUNE 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN
JURY DEMAND

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

PLAINTIFF'S MOTION TO AMEND COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15, Plaintiff Acuff-Rose Music, Inc. ("Acuff-Rose") moves for permission to amend the Complaint in this action. In Support of this Motion, Acuff-Rose states:

1. Acuff-Rose filed the Complaint in this action for copyright infringement and interference with business relationships and with prospective business advantage on June 18, 1990, based on

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Defendants' creation and distribution of a musical work entitled "Pretty Women." Acuff-Rose asserted, *inter alia*, that this work infringed Acuff-Rose's copyrighted work "Oh, Pretty Woman" and interfered with Acuff-Rose's business interests.

2. Defendants' label copy for "Pretty Woman" states that Roy Orbison and William Dees are the authors and states that Acuff-Rose Music, Inc. is the publisher. *See* Exhibit A.

3. On January 14, 1991, this Court granted Defendants' Motion for Summary Judgment on the grounds that Defendants' "Pretty Woman" was not an infringing derivative work because it was a parody of Acuff-Rose's "Oh, Pretty Woman" and because Defendants' parody use was a fair use under 17 U.S.C. § 107. The Court also held the Acuff-Rose's state law claims were preempted by the Copyright Act.

4. The Court's January 14, 1991, ruling in effect makes Defendants' work a new copyrightable work and one that contains a false and misleading designation of origin.

5. Even though Acuff-Rose specifically denied permission for its copyrighted work to appear on Defendants' album and never gave permission for its name to appear on Defendants' album, Defendants mislabelled and falsely designated Acuff-Rose Music, Inc. as the source of the work that appeared on Defendants' album under the name "Pretty Women." The mislabelling and misdesignation violates 15 U.S.C. § 1125(a), which protects fair business competition by prohibiting the use in commerce of false and misleading designations of origin.

6. Furthermore, Defendants' use of Acuff-Rose's name on the label copy violates 15 U.S.C. § 1125(a) by falsely indicating a

sponsorship, endorsement, license or other relationship between Defendants and Acuff-Rose.

7. Acuff-Rose seeks permission to amend the Complaint in this action to assert a claim pursuant to 15 U.S.C. § 1125(a) against Defendants for the false designation of origin and the mislabelling of the composition included on the album.

8. Acuff-Rose has filed and served herewith the proposed Amended Complaint.

9. Acuff-Rose has filed and served herewith a Memorandum of Law in support of this motion.

WHEREFORE, based on the foregoing, Acuff-Rose respectfully requests that the Court grant leave to amend the complaint in this action.

Respectfully submitted,

KING & BALLOW

s/ By:
Francis J. Del Casino
R. Eddie Wayland
E. Andrew Norwood
Francis J. Del Casino

1200 Noel Place
200 Fourth Avenue, North
Nashville, Tennessee 37219
(615) 259-3456

Attorneys for Plaintiff
Acuff-Rose Music, Inc.

Of Counsel:

Hal Willis
Opryland USA, Inc.
2806 Opryland Drive
Nashville, TN 37214

Acuff-Rose Music, Inc.

Appendix V

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiff's Motion to Amend Complaint was duly served this 10th day of June, 1991, by U.S. Mail, postage prepaid, addressed as follows:

Alan M. Turk, Esq.
Sanford R. Ross, Esq.
3310 West End Avenue
Fourth Floor
Nashville, Tennessee 37203

Alan Jacobi, Esq.
1313 125th Street, NE
North Miami, FL 33161

s/ Francis J. Del Casino
Francis J. Del Casino

Appendix V

EXHIBIT A — ALBUM COVER AND LABEL INFORMATION

(Omitted Here But Submitted Separately As Lodging)

APPENDIX W — DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR DISTRIBUTION OF FUNDS DATED JUNE 21, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, DIVISION

Case No. 3 90-0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR DISTRIBUTION OF FUNDS

The Plaintiff has moved for the Court to modify its Order entered on August 24, 1990, which provided that the Thirteen Thousand Eight Hundred Sixty Seven and 56/100 Dollars ($13,867.56) deposited by the Defendants in accordance with Rule 67 of the Federal Rules of Civil Procedure should be held by the Court during the pendency of the above captioned litigation or until such time as the Court determines said funds should be

released. The Plaintiff now seeks distribution of the subject funds. However, simultaneously with the Plaintiff's Motion for Distribution of Funds, the Plaintiff filed a Motion to Amend its Complaint alleging allegations under the Lanham Act. The Plaintiff's allegations under the Lanham Act are clearly inconsistent with the Plaintiff's Motion to Distribute Funds as compensation under the Copyright Act, 17 U.S.C. § 101, et seq. and inconsistent with the Court's Order of Summary Judgment entered on January 14, 1991, which held as a matter of law that the Defendants' version was a parody and constituted fair use under the Copyright Act, 17 U.S.C. § 107.

The Defendants respectfully assert that the Plaintiff can not, in good faith, asset that it is entitled to amend its Complaint and include allegations that the Defendants' conduct violates the Lanham Act while simultaneously requesting the distribution of funds under the Copyright Act. The Defendants respectfully assert that receipt by the Plaintiff of the funds deposited in Court by the Defendants estopped the Plaintiff from alleging violation of the Lanham Act and constitutes an accord and satisfaction thereby resolving the last remaining issue in the case at Bar.

The Defendants respectfully assert that the Court should deny the Plaintiff's Motion to Distribute Funds or in the alternative, shall distribute same and hold that such payment constitutes an accord and satisfaction thereafter dismissing the remaining allegations of the Plaintiff's original Complaint.

Respectfully submitted,

Appendix W

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue, 4th Floor
Nashville, TN 37203
(615) 386-9991
ATTORNEYS FOR PLAINTIFF

Appendix W

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed to Elizabeth B. Marney, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, Tennessee 37219, this 19 day of June, 1991

s/ Alan Mark Turk
ALAN MARK TURK

APPENDIX X — ORDER DENYING MOTION TO AMEND

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, et al.

ORDER

Plaintiff's motion to amend is denied. The amendment is untimely. By scheduling order proposed jointly by the parties pursuant to Rule 16, F.R.Civ. P. and Local Rule 11 of the Court, the parties had until January 31, 1991, to amend the pleadings. This proposed amendment was not filed until June 10, 1991, over four months after the cut-off date, after all discovery is complete, only two months before the scheduled trial date.

Plaintiff asserts a Lanham Act claim in its proposed amendment. If such a claim existed, it existed in June of 1990 when this case was originally filed. Plaintiff offers no excuse or explanation for its delay in assertion of the claim until after discovery was closed, after the scheduling order deadlines for amendments has passed, and only two months before trial date.

s/ Thomas A. Wiseman Jr.
Thomas A. Wiseman, Jr.
U.S. District Judge

APPENDIX Y —DECLARATION OF JERRY FLOWERS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

Case No. 3:90-0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

v.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

SKYYWALKER RECORDS,

Defendants.

DECLARATION OF JERRY FLOWERS

Pursuant to 28 U.S.C. § 1746, I, Jerry Flowers, declare under penalty of perjury, and under the Laws of the United States of America, and of my own knowledge that:

1. I am Executive Director of Opryland Music Group, Inc., and have been employed by Opryland Music Group, Inc., since October, 1987. Acuff-Rose Music, Inc., is a wholly owned subsidiary of Opryland Music Group, Inc.

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2. In my capacity as Executive Director of publishing, I oversee all aspects of Opryland Music Group's publishing activities, including licensing, exploitation of copyrights, the acquisition of new writers and music publishing catalogs, royalty accountings, copyright registrations, subpublishing agreements, and generally all matters ordinarily and customarily done in music publishing.

3. Prior to joining Opryland Music Group, I was Director of Marketing for Competitive Concepts, Inc. for 2 years; Vice President of Nashville operations for the Jim Halsey Company for 4 years; Director of Artist Development for RCA Records for 5 1/2 years; and National Sales Director for ABC Records for 2 1/2 years.

4. I am also a published songwriter and I have recorded for MGM and Sussex Records. In all, I have spent nearly 21 years in a variety of positions in the music industry.

5. Music publishers like Acuff-Rose make a large investment in the creation of new songs. A music publisher supports songwriters while they compose songs for the publisher. A publisher usually pays the songwriter a non-returnable advance or salary to compose songs exclusively for the publisher. The advances are recoupable by the publisher solely from future royalties generated by recorded songs that generate royalties.

6. Acuff-Rose also usually finances the making of demonstration records ("demo's") of songs that we believe are commercially exploitable. Demo records allow artists, producers, and record companies to decide whether to record the song for commercial release. Demos cost between $250 and $1000, with an average of about $400 per song, which includes fees for musicians, vocalists, arrangers, producers, and recording studio time.

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7. We also employ a staff of employees: professional managers of songpluggers, who attempt to secure recordings on the song by "pitching" the song to recording artists; personnel experienced in licensing the various uses of a song; personnel experienced in accounting for royalties received by the publisher for the song; and personnel experienced in copyright protection to secure the world-wide copyright.

8. A songwriter usually assigns the copyright in his song to the publisher in exchange for half of the royalties that the publisher receives from the exploitation of the song. Recordings of the song are the principle source of royalty income; however, royalties are also earned through synchronization licenses, print licenses and performance royalties.

9. Typically, fewer than 20% of the songs in a publisher's catalog are recorded. Moreover, fewer than 4% of the songs in a publisher's catalog will ever recoup the publisher's investment in the song.

10. Unless a song is recorded, it does not generate any income. If a song is recorded as written, the record company pays the publisher a mechanical royalty at approximately the current statutory rate of 5.7 cents per record sold, less any commissions. Because a license under the compulsory licensing provisions is very burdensome to the record company, usually the license is a negotiated license.

11. Further, a compulsory license is limited to the creation of sound recordings. Any other type of license, for example a synchronization license for a video or a license for the creation of a derivative work, must be negotiated. The grant of such licenses is within the discretion of the copyright holder.

Appendix Y

12. The publisher typically pays the writer of the song 50% of the 5.7 cents and 50% of the other royalties under the copyright assignment contract. For example then, a "Gold Record," which is the industry term for a record that sells in excess of 500,000 units, grosses the publisher $28,500 in mechanical royalties, half of which the publisher pays to the writer.

13. Once a song has been recorded, it is unlikely that the song will be recorded again for a period of five to ten years. The bulk of the royalties for a song are earned in the first two years after each recording. Some songs are recorded only once having become too identified with a particular artist.

14. Acuff-Rose is required in many cases to obtain the songwriter's permission before granting any licenses for the use of the song in any commercial advertisement. Writers and publishers fear that an established song that is used in a commercial advertisement may become too associated with the commercial product or will become overexposed, resulting in fewer subsequent recordings.

15. Examples of songs that have become closely associated with commercial products are Carly Simon's "Anticipation" with Heinz Catsup and Cindy Lauper's "True Colors" that was used by Kodak. Future recordings or uses of both of these songs are doubtful due to their strong identity with a catsup bottle and a film company.

16. Thus, in order to avoid the potential foreclosure of future recording opportunities, publishers grant few commercial licenses for established songs. Should the publisher grant a commercial license, the publisher will invariably retain a right of final approval over the use of the song and any requested change of the melody or lyric.

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17. Parodying established hit songs and licensing those parodies have become an extremely lucrative alternate market for songs. The well-established recognizability of the hit song contributes to the success of the parody.

18. Trade publications indicate that over three million recordings aggregate have been sold of such parodies as Weird Al Yankovic's "(I'm) Fat" (based on Michael Jackson's "(I'm) Bad"); "Eat It" (based on Michael Jacksons' "Beat It"); "Like a Sturgeon" (based on Madonna's "Like a Virgin") and "I Lost on Jeopardy" (based on "Our Love's In Jeopardy").

19. A parody and the original song on which the parody is based are often played on the same radio and television stations.

20. A parody, like a commercial use, may eliminate demand for the original or future recordings of the original. A new meaning is associated with the song in the minds of the listeners. In addition, performance royalties for the original recording may be reduced, because of over-exposure to the public; once listeners hear the identical melody and structure of the original in the parody, the desire to hear the song may be satiated.

21. Performance royalties on the original song, through such organizations as ASCAP or BMI, should be paid when a parody is broadcast. However, unless the parody is properly registered by the copyright holder, the royalties due will not be paid.

22. Music publishing is based on the judicious exploitation of copyrights by publishers. Because the economic margin of proper exploitation is so tight, publishers are extremely careful in the exercise of their exclusive rights. Moreover, publishers have duties both legal and practical to the creative talent that writes the songs

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published. A single imprudent use could permanently decrease the value of a copyright.

23. The use made by Two Live Crew appears to be such an imprudent use. The sanctioning of that use by the Court on January 14, 1991, has been followed by an unprecedented acceleration of the erosion of the economic value of the copyright to Acuff-Rose. "Oh, Pretty Woman", previously a standard in our catalogue, is in danger of becoming infringement-proof.

24. On April 4, 1991, at 7:19 a.m., radio station WRMX-FM (96.3) broadcast a song entitled "Is That A Woman" based on Acuff-Rose's "Oh, Pretty Woman." The WRMX song incorporated the entire melody, opening guitar refrain and overall structure of "Oh, Pretty Woman." The song substituted new lyrics.

25. No license was ever requested for this unauthorized derivative work of "Oh, Pretty Woman." Upon information and belief, the song was produced and distributed nationally.

26. On or about July 25, 1991, Deja Vu, a national chain of clubs featuring strippers, aired a radio commercial spot that utilized Acuff-Rose's "Oh, Pretty Woman", with altered lyrics. No license was requested for this unauthorized commercial use.

27. On or about June 14, 1991, Peggy Lamb, Opryland Music Group's Copyright Manager, received a request from Oscar Poche of AMPM Entertainment regarding the use of "Oh, Pretty Woman" in a rap song by the group Brother Makes 3. Mr. Poche included a tape of the recording. Brother Makes 3 sampled the whole chorus section or hook of the original Roy Orbison recording of "Oh, Pretty Woman."

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28. Sampling is a recording technique whereby a portion of a recording can be copied or "sampled" directly, and then incorporated into a new recording. The effect of the technique is to make the sampled portion appear to be part of the new recording.

29. Peggy Lamb advised me that Mr. Poche had initially called Tom Snell of Opryland Music Group regarding the request. Mr. Poche was advised that he should send a tape copy of the Brother Makes 3 recording to Peggy Lamb's attention.

30. I was given a report that Mr. Poche had told Tom Snell that Brother Makes 3 had made two versions of their rap song incorporating "Oh, Pretty Woman." The report stated that the second version did not utilize a "sample" of the Roy Orbison recording.

31. In its continuing efforts to protect its copyrights and its exclusive right to prepare or license others to prepare derivative works based on its copyrights, Acuff-Rose denied the Brother Makes 3 requests.

32. Prior to the Court's ruling of January 14, 1991, Acuff-Rose had not experienced the type of infringements referenced in this affidavit.

FURTHER DECLARANT SAITH NOT:

DATE: September 9, 1991

s/ Jerry W. Flowers
JERRY FLOWERS

APPENDIX Z—RESPONSE TO SUPPLEMENTAL BRIEF ON DAMAGES AND NEW EVIDENCE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

DEFENDANTS' RESPONSE TO SUPPLEMENTAL BRIEF ON DAMAGES AND NEW EVIDENCE

I. PREFACE

The Supplemental Brief filed by the Plaintiff, to which this Memorandum responds, raises two issues. The first issue is whether or not the Court should reconsider its finding that the Defendants' rendition of "Pretty Woman" is a parody of the Plaintiff's copyrighted work "Oh, Pretty Woman" and that the Defendants' version constitutes fair use under 17 U.S.C. § 107 of

the Copyright Act. The Plaintiff relies upon the declaration of Jerry Flowers in support of its Motion to Reconsider. The Defendants would state that the declaration of Jerry Flowers does not raise any new material facts in dispute upon which the Court might reconsider it's findings of fair use and granting of summary judgment. The declaration containing Mr. Flowers' unsupported conclusions is not relevant to the Court's decision that "Pretty Woman" is a parody of "Oh, Pretty Woman" and constitutes fair use. The alleged new evidence presented by the Plaintiff's Supplemental Brief does not change the Court's conclusion that as a matter of law in accordance with Rule 56 of the Federal Rules of Civil Procedure, the Defendants' parody constitutes fair use under 17 U.S.C. § 107 of the Copyright Act.

The second issue raised by the Plaintiff's Supplemental Brief is whether or not the Plaintiff is entitled to compensation by the Defendants for their fair use of "Oh, Pretty Woman" under the Copyright Act. The Plaintiff argues that if the Defendants' rendition does constitute fair use then the Plaintiff is not entitled to any damages including the funds deposited by the Defendants in accordance with Rule 67 of the Federal Rules of Civil Procedure. The Defendants acknowledge that the Plaintiff, in accordance with the Copyright Act is not entitled to compensation for the Defendants' fair use of "Oh, Pretty Woman". The Defendants respectfully request that the Court order that the funds deposited with the Court, together with interest earned thereon, be returned to the Defendants by and through their attorney, Alan Mark Turk, Attorney, P.C., in a check made payable to its escrow account.

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II. THE PLAINTIFF'S ALLEGED NEW EVIDENCE IS NOT RELEVANT TO THE ISSUE OF WHETHER OR NOT "PRETTY WOMAN" IS A PARODY AND CONSTITUTES FAIR USE OF "OH, PRETTY WOMAN"

The Court, in its Memorandum Opinion found as a matter of law that the Defendants' rendition of "Pretty Woman" constituted fair use of the Plaintiff's copyrighted work "Oh, Pretty Woman". The determination of whether or not a particular parody constitutes fair use is a mixed question of law and fact. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985). The Court, in its Memorandum Opinion, stated that:

> Based on the evidence presented by the parties in this case, including copies of the songs, correspondence and affidavits, whether the defendant's parody constitutes fair use under 17 U.S.C. § 107 is a question of law for the Court to determine.

(Memorandum, p. 5)

The declaration of Jerry Flowers creates no material facts in dispute upon which the Court should reconsider its conclusion that the Defendants' rendition of "Pretty Woman" constitutes fair use of "Oh, Pretty Woman".

Section 107 of the Copyright Act instructs courts to balance the following four factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107

The Court, in its Memorandum Opinion, reviewed each of these four factors in detail and reached the conclusion that the Defendants' use did not constitute infringement but rather fair use. (Memorandum Opinion, pages 4 through 16) The declaration of Jerry Flowers adds no new material facts upon which the Court should reconsider its determination. The declaration of Jerry Flowers does not change the purpose and character of the Defendants' use; does not change the nature of the copyrighted work; does not change the amount of quotation utilized by the defendants; and does not change the effect of the defendants' use in the marketplace. The declaration of Mr. Flowers alleges subsequent infringements by third parties and speculates that such infringements were proximately caused by the Court's Order of January 14, 1991. This argument is ridiculous. The fourth factor of the fair use analysis, as set forth in 17 U.S.C. § 107, relates to the effect the Defendants' use has on the Plaintiff's copyrighted work in the marketplace and not on the conduct of any third parties. The question of whether or not the use by these third parties of the Plaintiff's copyrighted work constitute infringement and/or fair use is not relevant to the issue as to whether or not the Defendants' version constitutes infringement and/or fair use. The determination of fair use is on a case by case basis. *Harper & Row Publishing, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

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III. THE DEFENDANTS ARE ENTITLED TO THE RETURN OF THE DEPOSITED FUNDS TOGETHER WITH INTEREST THEREON

The Defendants, in accordance with Rule 67 of the Federal Rules of Civil Procedure deposited with the Court certain funds to compensate the Plaintiff for their use of "Oh, Pretty Woman". At the time of the deposit, the Court had not yet ruled that the Defendants' use constituted fair use under the Copyright Act. Therefore, the deposit by the Defendants was in the amount that would have been owed by the Defendants to the Plaintiff if the Defendants' version had been held a derivative work under the Compulsory License Division of the Copyright Act, 17 U.S.C. § 115.

The Court, in its Memorandum Opinion, specifically stated that "this decision does not address whether the sum reflects adequate compliance with the Act." (Memorandum Opinion, page 3) The Defendants initially moved for the Court to order the payment of these deposited funds to the Plaintiff. The Defendants objected to the payment of these deposited funds to the Plaintiff. The Plaintiff now argues that if the Defendants' rendition of "Pretty Woman" constitutes fair use of its copyrighted work "Oh, Pretty Woman" then no monetary compensation is owed by the Defendants. The fair use provisions of the Copyright Act, 17 U.S.C § 107, make no reference to compensation for such fair use. The Defendants acknowledge that the Compulsory License provision of the Copyright Act, 17 U.S.C. § 115 is not applicable to fair use. Therefore, in light of the Court's Order of January 14, 1991, no compensation is owed by the Defendants to the Plaintiff. Therefore, the Court should order the return of the funds deposited by the Defendants and interest earned thereon. The return of these funds to the Defendants by Court Order would resolve the only

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issue not addressed by the Court's Order of January 14, 1991. Upon the return of the deposited funds, the Plaintiff could then, in accordance with the Appellate Rules of Civil Procedure, file a Notice of Appeal with the Sixth Circuit appealing the Court's Order of January 14, 1991. This is anticipated by the parties and the Court. The return of the deposited funds would remove the only remaining pre-condition to the filing of such appeal.

CONCLUSION

The alleged new evidence raised by the Plaintiff in the declaration of Jerry Flowers is not relevant and does not form a basis for the Court to reconsider its Order of January 14, 1991. Further, the Court should order the return of the funds deposited and interest thereon.

Respectfully submitted.

s/ Alan Turk
ALAN MARK TURK, S.C. #7342
3310 West End Avenue
Fourth Floor
Nashville, TN 37203
(615) 386-9991

Appendix Z

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed to R. Eddied Wayland, Attorney for Plaintiff, 1200 Noel Place, 200 Fourth Avenue, North, Nashville, TN 37219, this 20 day of September, 1991.

s/ Alan Turk

ALAN MARK TURK

APPENDIX AA — ORDER CONFIRMING SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

3:90-0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

Luther R. Campbell a/k/a Luke Skyywalker, Christopher Wongwon a/k/a Fresh Kid Ice, Mark Ross a/k/a Brother Marquis, David Hobbs a/k/a Mr. Mixx, p/k/a The 2 Live Crew

and

Skyywalker Records,

Defendants.

ORDER

In accordance with the Court's January 14, 1992 Order finding that the Defendants' musical parody is protected under the fair use doctrine, the Court hereby ORDERS that the sum total of the funds and interest deposited with the Court pursuant to Fed. R. Civ. P. 67 be returned to the Defendants.

This is a final order in the case from which an appeal of right lies.

IT IS SO ORDERED.

Appendix AA

s/ Thomas A. Wiseman, Jr.
Thomas A Wiseman, Jr.
U.S. District Judge

APPENDIX BB — ORDER TO DISTRIBUTE FUNDS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3 90 0524
JUDGE WISEMAN

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx, p/k/a THE 2 LIVE CREW,

and

LUKE SKYYWALKER RECORDS,

Defendants.

MOTION

Come now the Defendants and move for the Court to amend its Order entered September 30, 1991, to reflect that the funds and any interest thereon deposited with the Court by the Defendants be payable to Alan Mark Turk, Attorney, P.C., Trust Account to be distributed as follows: $5,000.00 shall be paid to Alan Mark Turk, Attorney, P.C., the balance of the funds shall be paid to Skyywalker Records.

Appendix BB

Respectfully submitted,

s/ Alan Mark Turk
ALAN MARK TURK, S.C. #7342
SANFORD R. ROSS, S.C. #13094
3310 West End Avenue, 4th Floor
Nashville, TN 37203
(615) 386-9991
ATTORNEYS FOR PLAINTIFF

[Handwritten]
GRANTED
s/ TA Wiseman
TA Wiseman, Judge

APPENDIX CC — NOTICE OF APPEAL FILED OCTOBER 15, 1991

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE, TENNESSEE

NOTICE OF APPEAL
JUDGE WISEMAN
Case No. 3:90-0524

ACUFF-ROSE MUSIC, INC.

Plaintiff,

vs.

LUTHER R. CAMPBELL a/k/a Luke Skyywalker, CHRISTOPHER WONGWON a/k/a Fresh Kid Ice, MARK ROSS a/k/a Brother Marquis, DAVID HOBBS a/k/a Mr. Mixx

p/k/a
THE 2 LIVE CREW
and

LUKE SKYYWALKER RECORDS,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Acuff-Rose, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit the final Order entered in this action on the 2nd day of October, 1991, confirming the grant of summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and distributing interpled funds.

Dated: October 14, 1991.

Appendix CC

Respectfully submitted,

KING & BALLOW
s/ R. Eddie Wayland
R. Eddie Wayland
Nora T. Cannon
E. Andrew Norwood
Francis J. Del Casino

Counsel for Appellant

1200 Noel Place
200 Fourth Avenue North
Nashville, Tennessee 37219
615/259-3456

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal was duly served, via U.S. Mail, postage prepaid, this 14th day of October, 1991, addressed as follows:

Alan M. Turk, Esquire
Fourth Floor
3310 West End Avenue
Nashville, Tennessee 37203

Sanford R. Ross, Esquire
Fourth Floor
3310 West End Avenue
Nashville, Tennessee 37203

Appendix CC

Alan Jacobi, Esquire
1313-125th Street, NE
North Miami, Florida 33161

s/ R. Eddie Wayland

APPENDIX DD — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 17, 1992

No. 91-6225

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER; CHRISTOPHER WONGWON, a/k/a FRESH KID ICE; MARK ROSS, a/k/a BROTHER MARQUIS; DAVID HOBBS, a/k/a MR. MIXX; professionally known as 2 LIVE CREW; LUKE SKYYWALKER RECORDS,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Middle District of Tennessee

---

Decided and Filed August 17, 1992

Before: NELSON and NORRIS, Circuit Judges; and JOINER, Senior District Judge.*

---

*Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

Appendix DD

JOINER, Senior District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. NELSON, Circuit Judge (pp. 19-34), delivered a separate dissenting opinion.

CHARLES W. JOINER, Senior District Judge. In this copyright case, plaintiff appeals summary judgment granted to defendants. The district court held that defendants' use of a song owned by plaintiff was a parody and therefore constituted a fair use of copyrighted material under section 107 of the Copyright Act, 17 U.S.C. § 101 *et seq.*

The 2 Live Crew, a rap music group, released for commercial distribution a version of Acuff-Rose Music's copyrighted song, "Oh, Pretty Woman." Acuff-Rose sued The 2 Live Crew, its individual members and its record company for copyright infringement and alleged pendent state law claims of interference with business relations and interference with prospective business advantage. Defendants filed a motion for dismissal, which was treated as a motion for summary judgment. The district court granted summary judgment, holding that The 2 Live Crew had created a parody and that the parody was a non-infringing "fair use" of the song as defined by section 107 of the 1976 Copyright Act. 17 U.S.C. § 107. We reverse.

I.

"Oh, Pretty Woman" was written and recorded by Roy Orbison and William Dees in 1964. Rights to the song were assigned to Acuff-Rose that same year, and Acuff-Rose registered for copyright protection. The song has become a pop music standard, and Acuff-Rose has realized substantial income from the licensing of "cover" recordings and other derivative works.

Luther Campbell, lead vocalist and song writer of The 2 Live Crew (2 Live Crew), wrote a version of "Oh, Pretty Woman" in May 1989, which he entitled "Pretty

Woman." By affidavit, Campbell stated that he had intended to create a parody as an attempt "through comical lyrics, to satirize the original work . . . ." In June 1989, Campbell's company, Luke Records (then doing business as Skyywalker Records), released "Pretty Woman" as one of ten tracks on a collection entitled "As Clean As They Wanna Be." The credits on the album[1] recognize Orbison and Dees as the writers of "Pretty Woman," and Acuff-Rose as publisher of the song.

On July 5, 1989, following release of the album, Linda Fine, general manager of Luke Records, wrote a letter to Gerald Tiefer of Opryland Music Group (of which Acuff-Rose is a part) to "inform [Tiefer] of 'Two Live Crew's' desire to do a parody" of "Oh, Pretty Woman."[2] Fine stressed that a parody was intended and that the popularity of 2 Live Crew ensured substantial sales:

> At the time of this writing the Group has a cut on the Billboard Rap Chart. I have enclosed a copy of the lyrics, so that you may see their satirical parody, very similar in vain [sic] to what Weird Al Yankovic and other satirical artists are doing.
>
> We intend that all credits (writer & publisher) show your complete ownership of the song, and of course we intend to pay statutory rates.

[1]We use the term "album" generically; "As Clean As They Wanna Be" was also released on compact disc and cassette tape.

[2]The parties dispute the above chronology. Defendants contend that Campbell intended all along to create a comic song and appropriately sought the permission of Acuff-Rose prior to doing so. Acuff-Rose sees Fine's letter as a effort to create a revisionist history of legitimacy for an act of piracy. The district court found that "As Clean As They Wanna Be" was released on July 15, 1989, subsequent to Fine's letter to Tiefer. Campbell's intent is not dispositive of the case, but we note that this finding contradicts Campbell's affidavit. The only support in the record for a July 15 release date is found in Acuff-Rose's response to the motion for dismissal, in which counsel asserted a release date "on or about July 15, 1989." Campbell's affidavit is a better factual source than counsel's contention.

> Kindly keep in mind that we present this to you in a humorous sense and in no way should this be construed as anything but a novelty record that will be heard by hundreds of thousands of new listeners in their homes.

Fine included a cassette tape of 2 Live Crew's version of the song and a lyric sheet for Tiefer to consider.

Tiefer responded tersely: "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" This refusal to grant a license did not dissuade 2 Live Crew from continuing to sell "As Clean As They Wanna Be."

Acuff-Rose brought suit in June 1990 and defendants responded by filing a motion to dismiss, accompanied by affidavits, and sought to deposit $13,867.56. This amount was apparently calculated after reference to statutory royalty rates established by the Copyright Act, and reflected defendants' understanding of what was owed to Acuff-Rose for use of the copyrighted song. The district court ordered the funds deposited with the Clerk of Court.[3] Acuff-Rose responded with affidavits, which the district court relied upon when granting summary judgment.

[3]At oral argument, counsel for 2 Live Crew stated that the deposit was a tactical mistake which should not be construed as an admission that the group's song was something other than a fair use parody. Our review of the record reveals confusion over the status of "Pretty Woman" as either a "comic" effort, such as those created by comic musician Weird Al Yankovic, or a "parody," which purports to deliver social commentary within a humorous framework. Yankovic's works are licensed uses, not "fair uses" for which a license is not required. This confusion on the part of 2 Live Crew adds weight to Acuff-Rose's assertion that Campbell's intent to create a parody was only formed after "Pretty Woman" was released.

Among the affidavits presented, defendants presented that of Oscar Brand.[4] Brand, who has himself recorded a number of songs which he terms "parodies," stated his opinion that "both the words and the music of the 2 Live Crew performance are classic parodies." Brand dissected the two songs and found substantial similarities of musical structure between them. The 2 Live Crew version has the same 4/4 drum beat as the original and includes a "very recognizable 'bass riff,'" which "is repeated *eight times* . . . ." However, the 2 Live Crew version diverges from the original by following the recognizable riff with "an atypical scraper -- a Latin musical device, quite antithetic to the Orbison musical styling." Further, in the 2 Live Crew version, the lead vocalist sings (or raps) "in the key of B major, which, performed against the A major chorus, gives the song a comic aspect."

Lyrically, Brand found "Pretty Woman" to be consistent with a long tradition in the United States of making social commentary through music. African-American rap music, Brand stated, uses parody as a form of protest, and often substitutes new words to "make fun of the 'white-bread' originals and the establishment . . . ." In "Pretty Woman," Brand concluded, "this anti-establishment singing group is trying to show how bland and banal the Orbison song seems to them. It's just one of many examples of their derisive approach to 'white-centered' popular music."

Acuff-Rose presented the affidavit of Ph.D. musicologist Earl V. Speilman. Speilman also examined and compared the two songs and determined that there is "a significant amount of similarity" between them. Speilman identified five specific similarities, including the repetition of the recognizable riff, which "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2

[4] 2 Live Crew also presented the affidavit of M. William Krasilovsky, whose conclusions and the reasons therefore are much the same as Brand's.

Live Crew." Speilman concluded that even a listener without musical training would readily discern that "Pretty Woman" was modelled after "Oh, Pretty Woman."

The district court determined that there were no genuine issues of fact material to the question of fair use in dispute, and that the case was therefore suitable for summary judgment. *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1153 (M.D. Tenn. 1991). The court then analyzed the factors by which an alleged infringing use is tested for fairness under section 107 of the Act. *Id.* at 1154-59.[5]

Following the district court's determination that "Pretty Woman" was a parody, Acuff-Rose filed motions to distribute the funds deposited by 2 Live Crew with the Clerk of Court, and sought reconsideration of the fair use determination by introducing additional evidence on the question of the impact of the parody upon the market value of the copyrighted original.[6] Based upon its determination of fair use, the district court granted summary judgment and ordered the funds returned to 2 Live Crew.

II.

We review the district court's grant of summary judgment *de novo*. *EEOC v. University of Detroit*, 904 F.2d 331, 334 (6th Cir. 1990). Summary judgment is appropriate if the non-moving party fails to establish a genuine issue of material fact on an element essential to its case and on which it would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322

[5] The district court also determined that Acuff-Rose's pendent state law claims were preempted by section 301 of the Copyright Act. *Acuff-Rose Music*, 754 F. Supp. at 1159-60. Acuff-Rose does not challenge this determination.

[6] Acuff-Rose also sought leave to amend its complaint to allege violations of the Lanham Act. 15 U.S.C. § 1125(a). The district court denied the motion and Acuff-Rose does not allege error in the denial.

(1986). In making that determination, we view the evidence in the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

These general principles apply to the question of fair use, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1257-58 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), which is a mixed question of law and fact. *Matthews Conveyor Co. v. Palmer Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943); *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 560 (1985). In reviewing the district court's determination of fair use, when that court has found facts sufficient to evaluate each of the factors enumerated in section 107 of the Copyright Act, we "'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.'" *Harper & Row*, 471 U.S. at 560 (quoting *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)). Our review of the record shows that no material facts are in dispute. The parties dispute the ultimate conclusions to be drawn from the facts. These judgments are legal in nature.

III.

Section 102(a) of the Copyright Act, adopted under the express authority of Section 8 of the United States Constitution granting Congress the power to give authors exclusive rights to their writings, protects "musical works, including any accompanying words." 17 U.S.C. § 102(a)(2). Section 106 of the Act grants to the copyright holder a variety of exclusive rights in the copyrighted work, including the right to "reproduce the copyrighted work in copies or phonorecords," and to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(1) and (2). The words and music to plaintiff's song "Oh Pretty Woman" are subject to these protections. However, plaintiff's exclusive rights are also subject to the provisions of sections 107 through

118 of the Act, which create exemptions and limitations on the owner's rights.

Section 107 of the Copyright Act states:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include --
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. In this case 2 Live Crew defends against a charge of copyright infringement by arguing that "Pretty Woman" falls within the exceptions spelled out in section 107.

In determining the scope and extent of the exceptions and limitations to copyright protection carved out by section 107, it is important to focus on the plain language of that section and the directions implicit in its form.

Section 107 takes from a copyright owner the exclusive rights to his work insofar as a derivative, or allegedly infringing work, is a "fair use" of the copyrighted work. Traditionally, fair use is defined as "'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent.'" *Harper & Row*, 471 U.S. at 549 (quoting H. Ball, *Law of Copyright and Literary Property*, 260 (1944)). Fair use is an "equitable rule of reason," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), which is used in order to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir 1980)). Fair use is the only exception to a copyright holder's exclusive rights in his work, but section 107 explains that the overarching concept of fair use embraces use of a copyrighted work for the purpose of "criticism, comment, news reporting, teaching, scholarship, or research."

As the jurisprudence of section 107 has developed, the courts have found that the section's recognition of "comment" and "criticism" as species of fair use also, by practical extension of those terms, includes the use of a copyrighted work (or a portion thereof) as a parody or satire of that work. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992). Indeed, the fair use formulation found in section 107 is a reflection of Congress's intent to codify the common law fair use doctrine,[7] which has long included parody. *Harper & Row*, 471 U.S. at 549; see also *Bloom & Hamlin v. Nixon*, 125 F. 977 (C.C.E.D. Pa. 1903) (a parody fair use involving vaudeville impersonations). Therefore, it is understandable that both the parties and the district court focus on parody in their analyses of fair use. However, because the text of section 107 lists specific fair uses, we find that the term parody

[7]*See*, S. Rep. No. 94-473, 94th Cong., 1st Sess. at 61-62 (1975); H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 65 (1976).

must be either subsumed within the statutory terms "criticism" or "comment," or be an entirely separate category of exception.

Unfortunately, the terminology of the fair use analysis has evolved in such a way that the popular definition of parody and the statutory definition of parody as a form of criticism have become somewhat confused. Popularly, the term parody may be described as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new artwork that makes ridiculous the style and expression of the original." *Rogers*, 960 F.2d at 309-10. This popular definition has been used on occasion as a synonym for that which is necessary to create an exception to the exclusive rights in a copyrighted work. This use, we find, creates confusion and should be avoided. Much of entertainment involves parodies in the popular sense, but section 107 does not direct the courts to conclude that all such parodies are fair uses. For the purposes of this opinion, we will assume, as found by the district court, that 2 Live Crew's song is a parody of Acuff-Rose's copyrighted song, and proceed to determine whether the calculus of section 107 results in a determination of fair use. That determination requires careful application of the four statutory factors. *Harper & Row*, 471 U.S. at 549; 3 M. Nimmer, *Nimmer on Copyright*, § 13.05[A] at 13-82.1. Although the question of fair use in the context of musical works is one of first impression in this circuit, we do not write on a clean slate.

Purpose and Character of Use

We look first to the purpose and character of the use of Acuff-Rose's song by 2 Live Crew. We accept the district court's conclusion that the purpose of the use was to parody the original.[8] We consider the character of the

[8]We do so with considerable reservation, as the district court's parody analysis does not, in our view, comport with proper analysis of that term.

The district court compared the statement of the parties' affiants and concluded: "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody." *Acuff Rose*, 754 F. Supp. at 1155. The district court closely parsed the lyrics of the two songs, finding that: "Although the parody starts out with the same lyrics as the original, it quickly degenerates into a play on words, substituting predictable lyrics with shocking ones." *Id.* 2 Live Crew contends that by way of the "shocking" lyrics "Pretty Woman" was intended to satirize the original work, as well as society at large. Our difficulty with the district court's conclusion that this intention was realized is that, even accepting that "Pretty Woman" is a comment on the banality of white-centered popular music, we cannot discern any parody of the original song. Failing a direct comment on the original, there can be no parody, as the "copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." *Rogers*, 960 F.2d at 310 (citing *MCA, Inc.*, 677 F.2d at 185).

In the copyrighted song, the singer remarks on the beauty of a woman he sees on the street. The singer is initially disappointed when the woman rebuffs his advances and later exults when the woman appears to change her mind. Campbell's lyrics involved women but aside from broadly evoking the theme of the original in the opening line of the 2 Live Crew version: "Pretty Woman -- Walkin' down the street, Pretty Woman -- Girl you look so sweet," bear no discernible relationship to the original. Instead, as Brand noted, the lyrics examine a series of women with unappealing attributes: "Big Hairy Woman -- You need to shave that stuff, Big Hairy Woman -- You know I bet it's tough, Big Hairy Woman -- All that hair it ain't legit, 'Cause you look like 'cousin it,' Big Hairy Woman," or who are not faithful: "Two Timin' Woman -- Girl you know you ain't right, Two Timin' Woman -- You's out with my boy last night, Two Timin' Woman -- That takes a load off my mind, Two Timin' Woman -- Now I know the baby ain't mine."

In our opinion, this is not a new work which makes ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work. We cannot see any thematic relationship between the copyrighted song and the alleged parody. The mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original. We find instructive the holding in *Elesmere v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980). The Court of Appeals for the Second Circuit agreed with the district court that the company of the television program "Saturday Night Live" had performed a parody -- entitled "I Love Sodom" -- of the then-widely known advertising jingle "I Love New York." The new work cast the original image-polishing effort as ridiculous by asserting that the effort to redeem New York City's image was futile. It is this sort of direct comment, comment which is expressly and unambiguously directed at the message of the original work, which constitutes a parody. Similarly, the court in *Rogers* found that a sculpture based upon a copyrighted

use separately. The use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair. *Sony Corp.*, 464 U.S. 417, 449 (1984). "While commercial motivation and fair use can exist side by side, the court may consider whether the alleged infringing use was primarily for public benefit or for private commercial gain." *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981). The Supreme Court explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

In the instant case, the district court found, and we agree, that "2 Live Crew's song is included on a commercially distributed album sold for the purpose of making a profit," and that "2 Live Crew's primary goal in releasing 'As Clean As They Wanna Be' is to sell its music . . . ." 754 F. Supp. at 1154. However, the district court saw the Supreme Court's holdings in *Sony Corp.* and *Harper & Row* regarding the presumptively unfair nature of a commercial purpose as "merely 'tend[ing] to weigh against a finding of fair use.'" *Id.* (quoting *Harper & Row*, 471 U.S. at 562). We agree that commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that "'[E]very commercial use of copyrighted material is presumptively an unfair

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photograph was not a parody regardless of the creator's alleged intention to point out the banality of the copyrighted work. *Rogers*, 960 F.2d at 309-10. The new work, the court found, could perhaps be seen as a critique of materialistic society at large, but on its face the sculpture failed to make critical comment regarding the original creative work. *Id.* We are in agreement with the *Rogers* court that the term parody cannot be allowed to assume too broad a definition, for if an "infringement of a copyrightable expression could be justified as a fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense." *Id.* at 310.

exploitation of the monopoly privilege that belongs to the owner of the copyright.'" 471 U.S. at 562 (quoting *Sony Corp.*, 464 U.S. at 451). Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked to then consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986).

Although in this case we do not set aside the district court's conclusion that 2 Live Crew's song is a criticism in the nature of a parody in the popular sense, we nevertheless find that the district court erred in the process of determining that the criticism constituted a fair use of the copyrighted work. We find that the admittedly commercial nature of the derivative work -- the *purpose* of the work being no less important than its *character* in the Act's formulation -- requires the conclusion that the first factor weighs against a finding of fair use. *Sony Corp.*, 464 U.S. at 449.

Nature of Copyrighted Work

The district court found that this factor weighed against a determination of fair use, and we agree. *Acuff-Rose*, 754 F. Supp at 1155-56. As a general rule, creative works -- literary works of fiction or artistic works -- are afforded greater protection from the fair use determination than are works of fact. *Harper & Row*, 471 U.S. at 563; *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 297 (1990). The status of "Oh, Pretty Woman" as a creative work is not contested. In determining whether this factor should weigh in favor of the copyright holder we also ask whether the work "represented a substantial investment of time and labor made in anticipation of financial return." *MCA, Inc.*, 677

F.2d at 182. The record amply supports a finding in favor of Acuff-Rose on this factor.

Portion Used

The third factor we consider is the amount and substantiality of the portion of the copyrighted work used in the derivative work in relation to the copyrighted work as a whole. As applied to alleged parodies, this factor has historically turned on analysis of the "conjure up" test. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom.*, *O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979). The test asks "whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire." *Id.* The test describes a continuum of use, and not only scrutinizes the extent of the taking, but the qualitative nature of that taking. *Harper & Row*, 471 U.S. at 565. A *de minimis* use, one that is meager and fragmentary, by definition fails to conjure up the original and does not constitute an infringement. *Elesmere*, 482 F. Supp. at 744. The 2 Live Crew, appropriately, does not attempt to characterize its use of the copyrighted work as *de minimis*. Uses which depart from the *de minimis* level may nevertheless be fair uses, but at some point on the continuum this factor militates against a finding of fair use. *Air Pirates*, 581 F.2d at 757. Parodies are generally allowed to use more of the copyrighted work and still fall within the rubric of fair use than are other types of copying:

> [T]he concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to 'conjure up' the original.

Elesmere, 623 F.2d at 253, n.1 (citation omitted).

The district court, having found that 2 Live Crew created a parody in the popular sense, applied the conjure up test. The amount of the original work which is appropriated is a factual issue, but the question whether the taking is excessive under the circumstances is one of law. *Fisher*, 794 F.2d at 438, n.4.

The district court, operating on the assumption that "Pretty Woman" is a parody, concluded: "In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose." *Acuff-Rose*, 754 F. Supp. at 1157. Clearly, the court was using the term parody in its popular sense. While it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. Both of defendants' affiants stated that 2 Live Crew's version tracks the music and meter of the original. These opinions were intended to demonstrate that the new song is a parody. However, these opinions point out the substantiality of copying. Near verbatim taking of the music and meter of a copyrighted work without the creation of a parody is excessive taking. *See MCA, Inc.*, 677 F.2d at 183-85. Most importantly, defendants' affiants stated that the song is built upon the recognizable bass or guitar riff of the original by repeating that riff eight times. Acuff-Rose's musicologist stated that the riff was probably sampled from the original, that is, simply recorded verbatim and then mixed with 2 Live Crew's additions. "[T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565. The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. *See Salinger v. Random House, Inc.*, 811 F.2d 90, 98 (2d Cir.), *reh'g denied*, 818 F.2d 252, *cert. denied*, 484 U.S. 890 (1987). We

conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original. The facts as developed under this factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" cannot be used in any way to support a finding of fair use.

Effect on Potential Market

This factor has been characterized as "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *see also Stewart*, 495 U.S. at 238. This factor requires that a balance be struck "between the benefit gained by the copyright owner when the copying is found an unfair use and the benefit gained by the public when the use is held to be fair." *Rogers*, 960 F.2d at 311. To demonstrate that the balance weighs in favor of a finding of no fair use:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

Sony Corp., 464 U.S. at 451 (emphasis in original). The focus is on *potential* harm, and the "inquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row*, 471 U.S. at 568.

In the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists. *See Rogers*, 960

F.2d at 312 (the court holding that "there is simply nothing in the record to support a view that [defendant] produced [the derivative art work] for anything other than sale as high-priced art. Hence, the likelihood of future harm to [plaintiff's] photograph is presumed, and plaintiff's market for his work has been prejudiced").

Having determined that 2 Live Crew created a parody, the district court refused to indulge the presumption and concluded that "it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original" because the "intended audience for the two songs is entirely different." *Acuff-Rose*, 754 F. Supp. at 1158. In reaching this conclusion, the district court largely relied on the affidavit of Krasilovsky who stated, in part: "I cannot see how it [the new work] can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." *Id.* Although we have already determined that harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses, we note that inquiry under the fourth statutory factor not only considers harm to the market for the original but harm to the market for derivative works as well. *Id.* This formulation was arrived at by Professor Nimmer, who provided an example relied upon by the *Rogers* court: "[A] movie adaptation is made of a book. Even though the movie may boost book sales, it is an unfair use because of the effect on the potential sale of adaptation rights." *Rogers*, 960 F.2d at 312 (citing 3 Nimmer, § 13.05[B]). Krasilovsky's statement is irrelevant as to the fourth statutory factor. The record on this factor does not support a finding of fair use.

Conclusion

Three of the factors set out in the statute weigh against a finding of fair use. One is, at best, neutral. In dealing with uses popularly termed parodies, the factors involving the commercial nature of the use and the damage to the defendant are of particular significance. It is likely, for example, that an identical use of the copyrighted work in

this case at a private gathering on a not-for-profit basis would be a fair use. It is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use.

We conclude that the district court erred in granting summary judgment to defendants. The four factors set forth in section 107 of the Act support the conclusion that 2 Live Crew's use of Acuff-Rose's copyrighted song was not a fair use. We **REVERSE** and **REMAND** for proceedings consistent with this opinion.

Appendix DD

DAVID A. NELSON, Circuit Judge, dissenting. A Second Circuit panel that included both of the cousins Hand once called the "fair use" issue "the most troublesome in the whole law of copyright." *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939). It has been said, indeed, that the fair use doctrine "is so flexible as virtually to defy definition." *Time, Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. 1968).

Perhaps the most troublesome fair use issue of all is the question of whether a particular parody constitutes fair use of a copyrighted original. The parody cases appear to be in hopeless conflict. Compare, for example, *Loew's, Inc. v. Columbia Broadcasting System*, 131 F.Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958) (Jack Benny's parody of the motion picture "Gaslight" held not to be fair use of the original), with *Berlin v. E. C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (Mad Magazine parodies of Irving Berlin songs held to be fair use).[1] *Cf. Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F.Supp. 348 (S.D. Cal. 1955), where the same district judge who rejected the fair use defense for Jack Benny's parody of "Gaslight" accepted the defense for a Sid Caesar parody of "From Here to Eternity." In sum, whether a particular parody is entitled to the protection of the fair use doctrine is a question likely to be dealt with by lower courts in much the same way that the Supreme Court deals with more than a few

[1]As *Berlin* points out, 329 F.2d at 544-45, *Loew's* has been widely criticized. Among the critics is no less a figure than Professor (later Justice) Benjamin Kaplan. See Kaplan, *An Unhurried View of Copyright* (1967) at 69. The Ninth Circuit has said that its *Loew's* decision "was essentially repudiated by Congress's recognition of parody in the notes to the Copyrights Act of 1976." *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986), citing 17 U.S.C.A § 107 Historical Note. (The Note quotes House Report No. 94-1476 as listing "use in a parody of some of the content of the work parodied" as among "the sort of activities the courts might regard as fair use under the circumstances.")

Appendix DD

questions of constitutional law; we think we know fair use when we see it, even if we cannot do a very good job of relating what we see (or do not see) to the governing text.

The text that is pertinent here is statutory, not constitutional.[2] Where parody is concerned, however, the guidance provided by the statute is at least as Delphic as that sometimes provided by the Constitution. The Copyright Act says that "the fair use of a copyrighted work . . . for purposes *such as* criticism, comment . . . scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107 (emphasis supplied). (The statute itself tells us that the words "such as" mean what they say and "are illustrative and not limitative." 17 U.S.C. § 101.) The statute then goes on to list four factors that shall be "include[d]" among the factors considered by a court in determining a question of fair use: "In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall *include* [the four factors.]" Section 107 (emphasis supplied). Here again, the list provided by Congress is "nonexclusive," to borrow the term used in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,

[2]There are, to be sure, authorities who would constitutionalize copyright law. Some would treat satire as sacrosanct under the First Amendment. See, *e.g.*, Goetsch, "Parody as Free Speech -- The Replacement of the Fair Use Doctrine By First Amendment Protection," 3 W. New Eng. L. Rev. 39 (1980). Others would accord constitutional protection to any parody a limitation on which would, in the opinion of the judge, impede "the Progress of Science" as that phrase is used in the Copyright Clause, Art. I, § 8 of the Constitution. See Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 23. As for me, I cannot work up much enthusiasm for turning every copyright case into a mini-*Marbury v. Madison* or *New York Times Co. v. Sullivan*. The major role in determining how to promote the progress of science has been given, after all, to Congress: "As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors. . . ." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). The Ninth Circuit has rejected out of hand the notion that the First Amendment gives parodists a blanket protection from copyright infringement actions. *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

471 U.S. 539, 549 (1985); the court is free to consider any other factors that may be relevant.

Where we are dealing with parody, as I shall suggest, unenumerated factors may have no less relevance than the four set forth in the statute -- and the statutory factors are likely to have a somewhat different impact on our deliberations than they would in a non-parody situation. Before turning to these matters, however, I think it would be helpful to consider what it is we are talking about when we speak of "parody."

The etymology of the word has direct relevance to this case. The term comes from the Greek *parodeia*, meaning "a song sung alongside another."[3] The musical parody is thus the very archetype of the genre.

One of the best definitions I have come across is the following, which appears in a prize-winning student essay:

> "A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic [or, I would add, for satiric] effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable." *Clemmons*, "Author v. Parodist: Striking a Compromise," ASCAP Copyright Law Symposium No. 33 (1987) at 101.[4]

[3]VII Encyclopedia Britannica (15th ed. 1975) at 768. "*Parodeia*" joins the Greek words for "beside" and "to sing" -- the roots of our prefix "para" and our word for a lyric poem, "ode." Webster's New International Dictionary (3d ed. 1961).

[4]See also Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395 (1984): "Parody, in its purest form, is the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original." The examples cited by the Harvard editors are Cervantes' *Don Quixote* (1614), Pope's *The Rape of the Lock* (1712), and Austen's *Northanger Abbey* (1818), all of which parodied then-popular literary genres. Judge Yankwich provides a much longer list of well known parodies in his article "Parody and Burlesque in the Law of Copyright," 33 Can. B. Rev. 1131 (1955). The art form goes back at least as far as Aristophines, the famous comic dramatist of ancient Greece, whose play *The Frogs* (405 B.C.) -- a work still performed today -- spoofed the plays of Aeschylus and Euripides.

Parodies often outlast and outshine the works parodied. A good example is Lewis Carroll's "You Are Old, Father William," a takeoff on Southey's work "The Old Man's Comforts." The texts, which are strikingly similar in form, may be read side-by-side in the appendix to Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34 (1987) at 37-38.

Some authorities go on to suggest that if the derivative work is to be treated as true parody, it must do more than achieve a comic effect: "It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist -- thereby giving the parody social value beyond its entertainment function." *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F.Supp. 351, 357 (N.D. Ga. 1979); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F.Supp. 1517, 1525 (S.D.N.Y. 1988). See also Faaland, "Parody and Fair Use: The Critical Question," 57 Wash. L. Rev. 163 (1981); Bisceglia, "Parody and Copyright Protection: Turning the Balancing Act into a Juggling Act," ASCAP Copyright Law Symposium No. 34, (1987). But whether or not a derivative work must "criticize" the original, I am not sure that I understand the reservations my colleagues on the panel have expressed in this case about accepting the district court's conclusion that 2 Live Crew's "Pretty Woman" is in fact a parody of the Acuff-Rose original. Under anyone's definition, it seems to me, the 2 Live Crew song is a quintessential parody.

The Second Circuit faced a similar definitional question in *Berlin v. E.C. Publications Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). One of the Irving Berlin pieces on which the Mad Magazine people had worked their peculiar magic was the song "A Pretty

Girl is Like a Melody." (Messrs. Orbison and Dees are obviously not the first tunesmiths to have turned their attention to a comely female.) The defendants, in the words of the court,

> "transformed the plaintiffs' 'A Pretty Girl Is Like a Melody,' into 'Louella Schwartz Describes Her Malady'; what was originally a tribute to feminine beauty became a burlesque of a feminine hypochondriac troubled with sleeplessness and a propensity to tell the world of her plight." *Id.* at 543.

This was "parody," the Second Circuit said -- and it was parody that constituted fair use of Irving Berlin's original work:

> "For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom -- both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' 'Don Quixote' and Swift's 'Gulliver's Travels,' or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest." *Id.* at 545.

In *Fisher v. Dees*, 794 F.2d 434 (9th Cir. 1986), similarly, the Ninth Circuit had occasion to analyze a pair of songs about women named "Sunny" or "Sonny." The first piece, recorded in the 1950s by Johnny Mathis, was entitled "When Sunny Gets Blue." The second, released in 1985 under the title "When Sonny Sniffs Glue," copied the first six bars (the recognizable main theme) of the original song's 38 bars. The derivative work transformed the original opening lyrics -- "When Sunny gets blue, her eyes get gray and cloudy, then the rain begins to fall" -- into "When Sonny sniffs glue, her eyes get red and bulgy, then her hair begins to fall." *Id.* at 434. After listening to tapes of both songs, the Ninth Circuit panel had no difficulty at all in rejecting an argument that "the so-called parody is not actually a parody, or at least is not

a parody of the composer's song." *Id.* at 436. Said the court,

> "Although we have no illusions of musical expertise, it was clear to us that Dees's version was intended to poke fun at the composers' song, and at Mr. Mathis's rather singular vocal range. We reject the notion that the song was used merely as a vehicle to achieve a comedic objective unrelated to the song, its place and time." *Id.*

Like the Second Circuit panel in *Berlin*, the *Fisher* court affirmed a finding that the parody was entitled to fair use protection as a matter of law. *Id.* at 440.

I myself have no more "illusions of musical expertise" than did the members of the court that decided *Fisher v. Dees*. After listening, however, to Exhibits D and E, the tapes of the two "Pretty Woman" songs, I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original -- and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernible.

The affidavit of Oscar Brand explains, as Judge Joiner has noted, that "this anti-establishment singing group [2 Live Crew] is trying to show how bland and banal the Orbison song seems to them." The district court accepted Brand's explanation. 754 F.Supp. at 1155. So do I. Whether one likes the original or not -- and the maxim "*de gustibus non est disputandum*" comes to mind here -- the original is quite clearly being held up to criticism by 2 Live Crew.

Consider the plot, if one may call it that, of the original work. A lonely man with a strangely nasal voice sees a pretty woman (name unknown) walking down the street.

The man speculates on whether the woman is lonely too. Apostrophizing her in his mind, he urges her to stop and talk and give him a smile and say she will stay with him and be his that night. The woman walks on by, and the man resigns himself to going home alone. Before he leaves, however, he sees the woman walking back to him. End of story.

This little vignette is intended, I think, to be sort of sweet. While it is certainly suggestive, it is also, by the standards of its time, "romantic" rather than indelicate. The singer evokes a sexual theme in his soliloquy, but then leaves the realization of his desire to the listener's imagination.

The parody by 2 Live Crew is much more explicit, and it reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses. The 2 Live Crew singers -- randy misogynists, not lonely Sir Lancelots -- raucously address a "big hairy woman" and her "bald-headed friend," one or both of whom are urged to "let the boys jump in." One singer chides a woman (the big hairy one, I think) for having cheated on him ("Two timin' woman/You's out with my boy last night"). In the end, this cloud proves to have what the singer sees as a silver lining:

> "Two timin' woman/That takes a load off my mind
> Two timin' woman/Now I know the baby ain't mine."

This, I should say, is "criticism" with a vengeance -- and the thematic relationship to the original is obvious. The relationship between the copyrighted song and the parody is every bit as patent here as was the corresponding relationship between the songs considered by the courts in *Elsmere Music, Inc. v. National*

Broadcasting Co., 482 F.Supp. 741 (S.D.N.Y. 1980), *aff'd* 623 F.2d 252 (2d Cir. 1980). That case involved an oft-repeated advertising jingle known as "I Love New York" and a Saturday Night Live take-off entitled "I Love Sodom." The parody was held to constitute a fair use of the original. The statutory factors, in my view, fully support a corresponding result in the instant case.

* * *

The first of the factors that we must consider is this:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes. . . ."

In the case before us, of course, the purpose is parody and the character is commercial. Does the mere fact that the parodists hoped to make money mean that their use of the original work is presumptively unfair? I am by no means convinced that the Supreme Court would so hold -- and any such presumption would be readily rebuttable in any event.

It is true that in the *Betamax* case, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), the Court made the broad statement that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. . . ." It is also true that this statement was quoted with approval in *Harper & Row*, 471 U.S. at 562. But both of those cases involved mechanical copying, literally or figuratively, without alteration of the copied material.

There is a difference, obviously, between copying and caricaturizing. By calling into being a new and transformed work, the caricaturist exercises a type of creativity that is foreign to the work of the copyist. And the creative work of the caricaturist is surely more

valuable than the reproductive work of the copyist. Thus it has been suggested that the presumption of unfairness in cases of commercial exploitation "is sensible and appropriate only when applied to commercial *reproductive* uses. . . ." Note, "The Parody Defense to Copyright Infringement: Productive Fair Use After *Betamax*," 97 Harv. L. Rev. 1395, 1408 (1984).

An illustration may help. W.S. Gilbert and Sir Arthur Sullivan created comic operas that are among the most commercially successful of all time. Gilbert and Sullivan certainly cannot be said to have had "nonprofit educational purposes" in mind when they wrote such a work as *Princess Ida*, one of their minor masterpieces. *Princess Ida* was, in Gilbert's words, "a respectful operatic perversion" of "The Princess," a lengthy poem by Tennyson. Would the world not be a poorer place if Lord Tennyson could have stilled the voice of W.S. Gilbert merely because Gilbert's purposes included the making of money? For anyone who loves Gilbert and Sullivan -- and their number is legion -- the question answers itself.

Similarly, I think, the world would be the poorer if the holders of the copyright on "I Love New York" had been allowed to block the Saturday Night Live rendition of "I Love Sodom." "[I]n today's world of often unrelieved solemnity," as the Second Circuit panel remarked in affirming the judgment in favor of Saturday Night Live, "copyright law should be hospitable to the humor of parody. . . ." *Elsmere Music Co., Inc.*, 623 F.2d at 253.

We should almost certainly be hospitable to the humor of parody if we allowed ourselves to be guided, as the Supreme Court was guided in the *Betamax* case, "by Justice Stewart's exposition of the correct approach to the ambiguities in the law of copyright." *Sony*, 464 U.S. at 431. The cause that is ultimately to be served, Justice Stewart observed in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), is "the cause of promoting broad public availability of literature, music

and other arts." What Justice Stewart called the "ultimate aim" of copyright law is "to stimulate artistic creativity for the general public good." *Id.* (footnote omitted). If we keep this ultimate aim in mind, it seems to me, we are not likely to conclude that parody for profit is presumptively "unfair."

* * *

The second statutory factor to be considered is

"(2) the nature of the copyrighted work. . . ."

The pertinent data in this connection are that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement occurred, and that theirs is a work of the imagination rather than a piece of historical reportage.

That the original song had long since been published is a factor which works in favor of the 2 Live Crew defendants. See *Harper & Row*, 471 U.S. at 564, where the Supreme Court declared that "the scope of fair use is narrower with respect to unpublished works." The fact that "Oh, Pretty Woman" is a creative work might tend to offset the publication factor, perhaps, if the work were not being used for the purpose of parody. But parody routinely sets its sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire *are* deserving of substantial freedom," *Berlin*, 329 F.2d at 545, it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia.

* * *

The third statutory factor is a somewhat problematical one, where parody is concerned:

> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. . . ."

The "portion used" test is problematical in this context because parody cannot be parody unless it allows the original work to shine through in a form which, while distorted, is recognizable. "Parody by its nature demands close imitation," Bisceglia, "Parody and Copyright Protection," ASCAP Copyright Law Symposium No. 34 at 17; substantial usage is thus almost a given.

The Ninth Circuit has held that the fair use defense must fail when the purported parodists' copying "is virtually complete or almost verbatim." *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979). I have no quarrel with this formulation; near-verbatim copying is closer to plagiarism than it is to parody. But neither the music nor the lyrics of 2 Live Crew's "Pretty Woman" can fairly be said to constitute near-verbatim copying of the Orbison and Dees original.[5]

"At the very least," the Second Circuit has said, a parody will pass muster under the "portion used" factor "where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire. . . ." *Berlin*, 329 F.2d at

[5]I recognize that the affidavit of musicologist Earl Spielman refers to a "one measure guitar lick" that "may have actually been sampled or lifted and then incorporated into the recording of 'Pretty Woman' as performed by The 2 Live Crew." But the Copyright Act "protects only those sound recordings 'fixed' on or after February 15, 1972," Note, "Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds," 87 Col. L. Rev. 1723, 1727-28 (1987), citing 17 U.S.C. § 301(c); Orbison and Dees recorded "Oh, Pretty Woman" in 1964. It is arguable, moreover, that a "sampling" of no more than a few notes should be governed by the maxim *de minimis non curat lex*. *Id.* at 1735. Finally, the plaintiffs have not shown by a preponderance of the evidence that any sampling really occurred here — and to my untrained ear, at least, it is obvious that most of the 2 Live Crew music was not lifted electronically from the 1964 recording.

545. Saturday Night Live's "I Love Sodom" was held to pass the "conjure up" test,[6] and 2 Live Crew's "Pretty Woman" does not appear to have appropriated more of the original on which it was based than did "I Love Sodom."

The district court (Wiseman, J.) made these observations about the amount and substantiality of the mimicry in the 2 Live Crew song:

> "In this case, 2 Live Crew has not mimicked so much of 'Oh, Pretty Woman' that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates*, this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin*. In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher*, 794 F.2d at 439." 754 F.Supp. at 1157.

I cannot improve on Judge Wiseman's analysis of the substantiality factor.

* * *

The last of the statutory factors is this:

[6]The Second Circuit noted by way of dictum in that case that "[e]ven more extensive use [than that necessary to 'conjure up' the original] would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary." 623 F.2d at 253 n.1. Professor Nimmer's treatise asserts that "[t]his went too far," adding that "[t]he Second Circuit later drew back from this extreme. . . ." 3 Nimmer on Copyright, § 13.03[f] at 13-90.9-.10 (1992), citing *Warner Bros., Inc. v. American Broadcasting Companies*, 654 F.2d 204 (2d Cir. 1981), and *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981). I am by no means sure that the *Elsmere* dictum did go too far, but it makes no difference in the case at bar; the 2 Live Crew song passes the "conjure up" test in any event.

"(4) the effect of the use upon the potential market for or value of the copyrighted work."

To me, at least, it seems as clear in this case as it did to the Second Circuit in *Berlin* that "the parody has neither the intent nor the effect of fulfilling the demand for the original. . . ." 329 F.2d at 545.

The affidavit of Oscar Brand says that

> "Parodies have never interfered with the popularity of the original. * * * The sales graph of 'Hello, Dolly' didn't change when it became 'Hello, Lyndon,' and 'Hello, Nixon.' Hundreds of popular songs have been 'covered' by parody performances and recordings without altering their popular appeal or interfering with their sales."

Although Brand's assertion that parodies have "never" interfered with the popularity of the original strikes me as dubious, there has been no showing of any such interference here.[7] Brand -- who is probably on firmer ground when he sticks to the specifics of this case -- explains that the audiences for the two songs are quite different:

> "There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.
>
> [ ] On the other hand, 2 Live Crew's version[ ], which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called 'race' records. The group's

[7]Because parody is a special case, moreover, a drop in the popularity of the original "Oh, Pretty Woman" would be of doubtful relevance anyway. "[W]e must accept the harsh truth that parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." Kaplan, *An Unhurried View of Copyright*, at 69.

> popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."

Brand's analysis of the market stands unrefuted. One month after Brand gave his affidavit, the plaintiff's Director of Licensing, Gerald Tiefer, executed an affidavit in which there is no attempt to deny that the two songs are aimed at different markets.[8] Mr. Tiefer does suggest, however, that the 2 Live Crew parody could impair the value of the plaintiff's right to grant licenses to parodists. And Mr. Jerry Flowers, Executive Director of Publishing for the plaintiff's parent corporation, says in an affidavit that the licensing of parodies of established hit songs has become extremely lucrative.

Judge Joiner invites our attention, in this connection, to *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), where the Second Circuit observed that "the inquiry considers not only harm to the market for the original [work], but also harm to the market for derivative works." In a passage a portion of which was quoted with approval in *Harper & Row*, 471 U.S. at 568, similarly, the Nimmer treatise says that "[i]f the defendant's work adversely affects the value of any of the rights of the copyrighted work . . . [including the right to license derivative works,] the use is not fair even if the rights thus affected have not as yet been exercised by the plaintiff." 3 Nimmer on Copyrights, § 13.05[B] at 13-88.19 (1992) (citations omitted).

Nimmer, however, is not discussing parody here; the quoted passage deals with a motion picture hypothetically adopted from a copyrighted novel. And neither *Rogers v.*

[8]This case is thus different from *New Line Cinema Corp. v. Bertlesman Music Group*, 693 F.Supp. 1517 (S.D.N.Y. 1988), where testimony "unequivocally established that the songs 'Nightmare on My Street' and 'Are You Ready for Freddy?' are in direct competition." *Id.* at 1528.

Koons nor *Harper & Row* involved parody either. The former was a case in which a sculpture had been copied with great fidelity from a photograph -- the artisans who produced the sculpture were told that the "*work must be just like photo*," 960 F.2d at 305 -- and the latter was a case in which quotations from the unpublished manuscript of President Ford's autobiography were lifted by the defendant verbatim.

Parody, again, is different. It transforms as it copies, and it may well savage the original work in the process. In the past, at least, copyright holders have not been overly enthusiastic about agreeing to see their works parodied -- and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success. . . ." *MCA, Inc. v. Wilson*, 677 F.2d 180, 191 (2d Cir. 1981) (Mansfield, J., dissenting).

I said earlier in this opinion that there may be factors which, although not enumerated in the Copyright Act, merit consideration by the courts in determining when parody constitutes fair use. I shall mention only one such factor -- one foreshadowed in what has already been said. It is this: *the social value of the parody as criticism.*

In the case at bar, it seems to me, this factor militates rather strongly in favor of affirmance of the district

court's finding of fair use. The 2 Live Crew "Pretty Woman" is hopelessly vulgar, to be sure,[9] but we ought not let that fact conceal what may be the song's most significant message -- for here the vulgarity, to paraphrase Marshall McLuhan, *is* the message. The original work may not seem vulgar, at first blush, but the 2 Live Crew group are telling us, knowingly or unknowingly, that vulgar is precisely what "Oh, Pretty Woman" is. Whether we agree or disagree, this perception is not one we ought to suppress.

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[9]Vulgarity, in practice, probably cuts against acceptance of the parody defense. See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981), where the panel majority said this:

> "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society." *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981).

I have some sympathy for this attitude, particularly where the parties really are "competitors;" be the lyrics of the derivative work dirty or clean, it goes against the grain to let a competitor reap where he has not sown. In the case at bar, however, there has been no showing that the parties are competitors. The 2 Live Crew song, moreover, is not just "a parody or satire on the mores of society" -- it is a parody or satire on the mores of Orbison's Pretty Woman and her admirer.

APPENDIX EE — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED OCTOBER 26, 1992 DENYING PETITION FOR REHEARING EN BANC

No.91-6225

UNITED STATES COURT OFAPPEALS
FOR THE SIXTH CIRCUIT

ACUFF-ROSE MUSIC, INC.,

Plaintiff-Appellant,

v.

LUTHER R. CAMPBELL, A/K/A LUKE SKYYWALKER, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: NELSON and NORRIS, Circuit Judges; and JOINER,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Charles W. Joiner sitting by designation from the Eastern District of Michigan.

Appendix EE

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk